Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ADVANTAGE WEST PALM BEACH, INC., BERT MOERINGS and MARSHA MOERINGS,

Petitioners,

v.

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, INC.,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fourth District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a series of arms-length transactions, petitioners acquired development rights that were created by the adoption of a municipal development order approving a development of regional impact. The development order granted the original applicant the right to construct offices, retail stores, hotel rooms and dwelling units on a 77-acre parcel of land in West Palm Beach, Florida. At the time that respondent commenced an eminent domain action to take the property and the development rights, petitioners owned a small parcel of the real property and in excess of 900,000 square feet of development rights for the entire parcel. The Florida courts, however, held that petitioners were entitled to compensation *only* for the real property taken by the respondent and that the "floating" development rights held by petitioners have *no compensable value*. The question presented is:

Are intangible development rights created by a governmental development order "property," within the meaning of the Takings Clause of the Fifth Amendment to the United States Constitution, for the taking of which development rights an owner must be compensated by the government in an eminent domain proceeding?

LIST PURSUANT TO RULE 29.6

The petitioners do not have any parent companies or non-wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST PURSUANT TO RULE 29.6 ii

TABLE OF CITATIONS v

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. The Eminent Domain Proceeding. 1

B. Advantage's Acquisition of the Development Rights. 3

C. The Litigation 6

REASONS FOR GRANTING THE PETITION 8

A. A Governmental Taking of "Development Rights" is a Taking of Property Rights 9

B. The Decision of the Florida Courts to Allow Uncompensated Takings of "Floating" Development Rights is in Conflict With This Court's Precedent on the Value of Severable Development Rights. 13

1. The severability of property rights. 13

TABLE OF CONTENTS
(Continued)

Page

2. The value of transferable development rights..... 14

3. The conflict with this Court's precedent on this important takings issue warrants a grant of certiorari. 19

CONCLUSION..... 23

TABLE OF CITATIONS

Page

Cases

Ansin v. Thurston
101 So. 2d 808 (Fla. 1958).....7

Armstrong v. United States
364 U.S. 40 (1960) 12

Arthur v. Hillsborough County Board of Criminal Justice
498 U.S. 801 (1990).....7

Busch v. Florida
446 U.S. 902 (Fla. 1980).....7

Eastern Enterprises v. Apfel
524 U.S. 498, 118 S. Ct. 2131 (1998) 12

Ibanez v. Florida Department of Professional Regulation, Board of Accountancy
510 U.S. 1067 (1994) 7

Jenkins v. State
385 So. 2d 1356 (Fla. 1980) 7

Kaiser Aetna v. United States
444 U.S. 164 (1979).....9

Louisville Joint Stock Land Bank v. Radford
295 U.S. 555 (1935)..... 12

Lucas v. South Carolina Coastal Council
505 U.S. 1003 (1992) 10, 12

Lynch v. United States
292 U.S. 571 (1934)..... 12

TABLE OF CITATIONS
(Continued)

Page

Macmillan, Inc. v. CF Lex Associates
56 N.Y.2d 386, 452 N.Y.S.2d 377,
437 N.E.2d 1134 (1982) 11

Nollan v. California Coastal Commission
483 U.S. 825 (1987) 11, 12, 13, 14

Palmore v. Sidoti
466 U.S. 429 (1984) 7

Penn Central Transportation Company v.
City of New York
438 U.S. 104 (1978) ..... passim

Pennsylvania Coal Co. v. Mahon
260 U.S. 393 (1922) 11

Phillips v. Washington Legal Foundation
524 U.S. 156, 118 S. Ct. 1925 (1998) 10, 20

Ruckelshaus v. Monsanto Co.
467 U.S. 986 (1984) 12

Seawall Associates v. City of New York
74 N.Y.2d 92, 544 N.Y.S.2d 542,
542 N.E.2d 1059,
cert. denied, 493 U.S. 976 (1989) 14

Suitum v. Tahoe Regional Planning Agency
520 U.S. 725, 117 S. Ct. 1659 (1997) 17, 19, 21

United States v. Causby
328 U.S. 256 (1946) 11

Williams v. Florida
399 U.S. 78 (1970) 7

TABLE OF CITATIONS
(Continued)

Page

Yee v. City of Escondido
503 U.S. 519 (1992) 20

State Constitution

Art. V, § 3(b)(3), Fla. Const. (1980) 7

Statutes

28 U.S.C. § 1257(a) 1

§ 380.06(1), Fla. Stat. (1997) 2

§ 380.031(2), Fla. Stat. (1997) 2

§ 380.06(2)(a), Fla. Stat. (1997) 2

§ 380.06(5)-(20), Fla. Stat. (1997) 2

§ 380.06(15)(b), Fla. Stat. (1997) 2

Other Authorities

BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10 (1977) 10

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83 YALE L.J. 75 (1973) 15

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43 WASH. U. J. URB. & CONTEMP. L. 85 (1993) 12

TABLE OF CITATIONS
(Continued)

Page

MARTIN A. GARRET, JR., LAND USE REGULATION: THE IMPACTS OF ALTERNATIVE LAND USE RIGHTS 76 (1987) 12

Margaret Giordano, Note, *Over-Stuffing the Envelope: The Problems with Creative Transfer of Development Rights* 16 FORDHAM URB. L.J. 43 (1988) 15

Michael B. Hitchcock, *Suitum v. Tahoe Regional Planning Agency: Applying the Takings Ripeness Rule to Land Use Regulations and Transferable Development Rights* 28 GOLDEN GATE U. L. REV. 87 (1998) 21

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TABLE OF CITATIONS
(Continued)

Page

Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*
88 COLUM. L. REV. 1667 (1988) 14

David A. Richards, *Downtown Growth Control Through Development Rights Transfer*
21 REAL PROP. PROB. & TR. J. 435 (1986) 15

JULIUS L. SACKMAN, 2 NICHOLS' LAW OF EMINENT DOMAIN
§ 5.01[1] (3rd ed. 1995) 10, 11, 12

Sarah J. Stevenson, *Banking on TDRs: The Government's Role as Banker of Transferable Development Rights*
73 N.Y.U. L. REV. 1329 (1998) 14, 17, 22, 23

Joseph D. Stinson, Note and Comment, *Transferring Development Rights: Purpose, Problems & Prospects in New York*
17 PACE L. REV. 319 (1996) 12

James T. B. Tripp & Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*
6 YALE J. ON REG. 369 (1989) 16

Judith W. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*
65 N.C. L. REV. 957 (1987) 15, 22

TABLE OF CITATIONS
(Continued)

Page

Leif Wenar, *The Concept of Property and the Takings Clause*
97 COLUM L. REV. 1923 (1997)..... 10, 14

APPENDIX

Page

Appendix A — Opinion Of The District Court Of Appeal Of The State Of Florida For The Fourth District Dated And Filed October 14, 1998 ..... 1a

Appendix B — Judgment Regarding Development Rights Of The Circuit Court Of The Fifteenth Judicial Circuit, In And For Palm Beach County, Florida Dated September 22, 1997 ..... 4a

Appendix C — Order On Petitioner's Motion In Limine Of The Circuit Court Of The Fifteenth Judicial Circuit, In And For Palm Beach County, Florida Dated September 22, 1997 ..... 11a

Appendix D — Opinion Of The District Court Of Appeal Of The State Of Florida For The Fourth District Denying Rehearing Dated And Filed December 16, 1998 ..... 13a

Appendix E — Excerpts From Agreed Order Of Taking Of The Circuit Court Of The Fifteenth Judicial Circuit Of Florida, In And For Palm Beach County Dated January 6, 1997 ..... 15a

Appendix F — Excerpts From Ordinance No. 2268-89 Of The City Of West Palm Beach, Florida Dated March 20, 1989 ..... 21a

APPENDIX
(Continued)

	Page
Appendix G — Petition In Eminent Domain Dated And Filed June 21, 1996	33a
Appendix H — Motion In Limine Dated March 26, 1997	40a
Appendix I — Collateral Assignment Of Development Rights Dated February 16, 1990	45a
Appendix J — Excerpts From Agreement For The Purchase And Sale Of Real Property Dated June 28, 1991	50a
Appendix K — Absolute Assignment Of Development Rights Dated December 30, 1992	55a
Appendix L — Absolute Assignment Of Development Rights Dated April 15, 1994	59a
Appendix M — Settlement Agreements Dated November 1994 And November 18, 1994	62a
Appendix N — Letters Of Advantage West Palm Beach, Inc. And First Union National Bank Of Florida Dated December 15, 1994	69a
Appendix O — Letter Of The City Of West Palm Beach Dated December 15, 1994	76a

APPENDIX
(Continued)

	Page
Appendix P — Absolute Assignment Of Development Rights Dated December 22, 1994	80a
Appendix Q — Excerpt Of Resolution No. 136-95 Of The City Of West Palm Beach, Florida	85a
Appendix R — Letter Of The City Of West Palm Beach Dated August 4, 1995	87a
Appendix S — Contract Dated June 6, 1996	90a

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Petitioners Advantage West Palm Beach, Inc., Bert Moerings, and Marsha Moerings respectfully petition for a writ of certiorari to review the judgment and opinion of the District Court of Florida, Fourth District in this cause.

OPINIONS AND ORDERS BELOW

The opinions of the District Court of Appeal of Florida, Fourth District, Appendix A & D, are not yet reported. The opinion of the state trial court, Appendix B, is unreported.

JURISDICTION

The District Court of Appeal of Florida, Fourth District issued its decision on October 14, 1998, Appendix A, and denied rehearing on December 16, 1998, Appendix D. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V:

> ... nor shall private property be taken for public use, without just compensation.

STATEMENT

A. The Eminent Domain Proceeding.

The petitioners before the Court are Advantage West Palm Beach, Inc., Bert Moerings, and Marsha Moerings (collectively Advantage). Along with numerous other owners of property rights within a 77-acre parcel of land located in West Palm Beach, Florida, Advantage was named as a respondent in an eminent domain action brought in Florida state court by the West Palm Beach Community Redevelopment Agency (CRA). The CRA sought to condemn the real property, as well as "any and all rights of

development appertaining to said property pursuant to City of West Palm Beach Ordinance No. 2268-89." Appendix G. The cited ordinance was adopted by the City of West Palm Beach on March 6, 1989, to approve an application by an entity known as the Downtown Uptown Venture (DUV) for a Development of Regional Impact (DRI). Appendix F.[1]

The ordinance granted the DUV the rights "to construct 3.7 million square feet of office space, 190,000 square feet of retail, 800 hotel rooms, and 1,000 dwelling units" on a 77-acre parcel of land. Appendix F. Included among the conditions set forth in the ordinance (which constitutes a "development order" under Florida law, §§ 380.031(2), 380.06(15)(b), Fla. Stat. (1997)) is a requirement for individual site plan review by the City for each parcel or portion of a parcel to which the developer seeks to attach development rights. *Id.* at 29a. Expressly set forth in the ordinance is a provision that the development order for the DRI "shall be binding upon and inure to the benefit of the Developer and its assigns or successors in interest and the present owners and their assigns or successors in interest." *Id.* at 31a.

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[1] A "development of regional impact" is defined by the Florida Legislature as "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county." § 380.06(1), Fla. Stat. (1997). The state's land-planning agency is charged with the development of statewide guidelines and standards to be used in determining whether a proposed project should be treated as a DRI. § 380.06(2)(a), Fla. Stat. (1997). The consequence of a development being treated as a DRI is that the developer is required to obtain approval from both the local governmental entity and a regional planning agency. § 380.06(5)-(20), Fla. Stat. (1997).

B. Advantage's Acquisition of the Development Rights.

Advantage, acting through Mr. and Mrs. Moerings, loaned the DUV $1.25 million in 1990, taking back a first mortgage and a collateral assignment of 125,000 square feet of commercial development rights within the DRI. Appendix I. The collateral assignment recites that the City's development order grants to the DUV "certain development rights with respect to the development known as Downtown/Uptown, within which development the subject property is located." *Id.* The collateral assignment pledges "a portion of the development rights" held by the DUV as security for the mortgage debt. *Id.*

After the DUV defaulted on the mortgage loan, resulting in a successful foreclosure action being brought by Advantage, the DUV (acting through a trustee) assigned development rights for 370,000 square feet of office and retail space within the DRI to Advantage in exchange for Advantage's forbearance in the enforcement of the foreclosure judgment. Appendix K. As the DUV continued to encounter financial difficulties (and suffered an adverse decision in a condemnation action brought by the City to obtain title to a right-of-way to which the City asserted entitlement under the terms of the development order), the DUV assigned additional development rights to Advantage in exchange for Advantage's abandonment of the foreclosure judgment and forgiveness of the DUV's debt. Appendix L. The assignment, which was executed on April 15, 1994, is titled "Absolute Assignment of Development Rights." *Id.* Advantage received "the right to utilize" significant additional square footage within the DRI for office space, retail stores, hotel rooms and residential units. *Id.*

Having acquired these development rights, Advantage commenced its efforts to redevelop the DRI, in pursuance of which efforts Advantage entered into a settlement agreement with the DUV. Appendix M. Advantage paid $600,000 to the DUV and received "first-phase

development rights as a separate asset from all real property holdings." *Id.*[2]

Simultaneously with the execution of the Advantage/DUV settlement, the DUV and the City of West Palm Beach settled the condemnation action, which action was then pending on appeal. *Id.* The agreement between the DUV and the City included the City's acknowledgement that development rights created by the DRI had vested. *Id.*

The City thereafter repeatedly acknowledged Advantage's acquisition of the development rights and, indeed, benefited thereby. After the settlement between the City and the DUV, the City was besieged by the DUV's creditors, including First Union National Bank, to which Advantage offered 50,000 square feet of development rights in exchange for a release. Appendix N. At the City's urging, First Union accepted this offer. *Id.* First Union thereafter inquired of the City as to the scope of the development rights transferred to it by Advantage, to which inquiry the City responded that "[t]he development rights under the DRI have purportedly been severed from the ownership of the underlying real estate" by the assignments to Advantage and that the City "will likely require a judicial determination" regarding development rights for any particular parcel within the DRI unless the property owner has secured development rights from Advantage. Appendix O. First Union thereafter secured an assignment of development rights from Advantage, authorizing First Union to use 50,000 square feet of retail space. Appendix P. The City Commission approved First Union's application for site plan approval, allowing the use of the development rights assigned to First Union by Advantage. Appendix Q.

On August 4, 1995, the mayor of West Palm Beach wrote to Mr. Moerings, thanking Advantage for its efforts

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[2] Advantage agreed to value the development rights at no less than $845,000, and to pay the first $750,000 of the proceeds from any sale of the development rights to the original principals of the DUV. *Id.*

to revitalize the DRI. Appendix R. The mayor stated that the City intended to treat Mr. Moerings and Advantage "fairly in any future transactions ... concerning the City's acquisition of your rights." *Id.* The letter further stated: "It is the City's intention, under any such acquisition process, to pay your Company fair market value for any and all rights which your company may own and which are necessary for assembly and development of the Downtown/Uptown project." *Id.* Shortly before the City instituted its eminent domain action, Advantage sold 60,000 square feet of commercial development rights and an option to purchase an additional 40,000 square feet of rights to a retail furniture store for a total price of $30,000. Appendix S.[3]

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[3] At trial before the state court, Advantage, presented ample — and uncontradicted — expert testimony to establish that its development rights are subject to valuation in an eminent domain proceeding. A certified real estate appraiser who had been employed by the Federal Deposit Insurance Corporation to assess the value of properties within the DRI testified that the properties, standing alone, had a zero value because of Advantage's ownership of the separate development rights. Transcript at 367-68. This testimony was bolstered by two expert witnesses: a real estate consultant and appraiser who testified that assignments of development rights "significantly affect the potential value of the parcels that might be developed after the rights have been assigned"; and Dr. James Nicholas of the University of Florida, who testified that Advantage's "floating" development rights have independent value and are marketable. Transcript at 172, 179-80. Dr. Nicholas explained that there are "two different types of transfer of development rights": "the formal recognized transfer ... of development rights" (or TDR) and "the informal transfer" between property owners. *Id.* at 167. An informal transfer will usually take place within "a described property or development" where there is multiple ownership of the various properties, as in the Downtown/Uptown DRI, with the price for development rights set by the existing market. The government plays no role in allocating development rights within a DRI because "there is no need" for government intervention. *Id.* at 171-72. The CRA presented no contrary evidence.

C. The Litigation.

After instituting the eminent domain action and securing an order of taking, pursuant to which order the CRA took title to Advantage's development rights, Appendix E, the CRA requested a hearing before the trial court to determine whether Advantage's development rights should be separately valued and Advantage compensated therefor. Appendix H. Following a non-jury trial, the court entered an order declaring that Advantage's development rights are without value. Appendix B.

The court found that the City had not "recognized any development rights" being held by Advantage and that no such rights existed:

> The development rights in question have no value. They were not created by the enactment of the DRI. They do not exist separate and apart from the underlying realty. They were not severable from the realty.
>
> * * *
>
> These "rights" did not exist to be transferred or assigned.

Id. The court accordingly ruled that Advantage had "no separate, compensable property interest known as development rights," and was thus entitled to no compensation for the taking thereof by the CRA. *Id.*

On Advantage's appeal to the District Court of Appeal of Florida, Fourth District, the appellate court approved the trial court's order and held as follows:

> The DRI did not create a species of property known as transferrable development rights. Unlike Palm Beach County, the City of West Palm Beach has never adopted a Transfer of Development Rights Ordinance. Neither the language of the DRI, nor the development process contemplated by the ordinance, support the conclusion that transferrable development

> rights were created for which appellants are entitled to be compensated ....

Appendix A.[4] On Advantage's motion for rehearing, the court stated that its ruling does not mean that the existence

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[4] Under Florida's two-tiered appellate court structure, the district courts of appeal have always been deemed the "highest state court," with the Florida Supreme Court having only highly-limited (and discretionary) authority to review decisions of the district courts of appeal. *E.g., Jenkins v. State,* 385 So. 2d 1356, 1357-58 (Fla. 1980) (under Florida Constitution, "[i]t was never intended that the district courts of appeal should be intermediate courts"; supreme court functions as "a supervisory body in the judicial system ... exercising power in certain specified areas ... with review by the district courts in most instances being final and absolute") (quoting *Ansin v. Thurston,* 101 So. 2d 808, 810 (Fla. 1958)). This Court accordingly has treated the Florida district courts of appeal as the "highest state court" under Section 1257(a). *E.g., Palmore v. Sidoti,* 466 U.S. 429, 431 (1984); *Williams v. Florida,* 399 U.S. 78, 80 n.5 (1970). Florida litigants who are unsuccessful before a district court of appeal have thus proceeded directly before this Court on certiorari, obtaining review of district court decisions. *E.g., Ibanez v. Florida Department of Professional Regulation, Board of Accountancy,* 510 U.S. 1067 (1994); *Arthur v. Hillsborough County Board of Criminal Justice,* 498 U.S. 801 (1990); *Busch v. Florida,* 446 U.S. 902 (Fla. 1980). The 1980 amendments to the Florida Constitution limited yet more stringently the Florida Supreme Court's jurisdiction, providing that the court may only review a district court of appeal decision "that *expressly and directly* conflicts with a decision of another district court of appeal or of the supreme court on the *same question of law,*" in the absence of a certification by the district court of appeal that its decision should be reviewed by the Florida Supreme Court because a question of great public importance is presented thereby. Art. V, § 3(b)(3), Fla. Const. (1980) (emphasis supplied). Because no Florida appellate decision has ever addressed the compensable nature of severable or "floating" development rights, Advantage's only option for seeking review of the Fourth District's decision in the Florida Supreme Court was by obtaining a certification from the Fourth District that the first decision in this case passes upon a question of great public

(continued . . .)

of a legislative enactment on the transfer of development rights "is a prerequisite to a *compensable* taking of so-called 'floating' development rights." Appendix D.

REASONS FOR GRANTING THE PETITION

THE QUESTION WHETHER SEVERABLE DEVELOPMENT RIGHTS CONSTITUTE "PROPERTY," THE TAKING OF WHICH BY A GOVERNMENTAL ENTITY REQUIRES THE PAYMENT OF JUST COMPENSATION TO THE OWNER OF THE DEVELOPMENT RIGHTS, IS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

The City's development order conferred significant rights to develop the property located within the boundaries of the DRI, allowing for the development of almost four million square feet of offices and retail stores, 800 hotel rooms and 1,000 residential units on a 77-acre parcel of property. Those development rights were indisputably taken from Advantage in the CRA's eminent domain action, as set forth in the order of taking. Advantage, however, was denied any opportunity to establish before a jury the value of the lost development rights — because the Florida courts have determined that "[t]he development rights in question *have no value*" as a matter of law. Appendix A (emphasis supplied). While weighty and of significant import, particularly in light of the increasingly-widespread use of transferable development rights as a land-use planning mechanism, the question presented by the rulings in the case is simple and straightforward: do severable or

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(. . . continued)

interest. Such a request was made to the court in conjunction with Advantage's motion for rehearing and was denied. Appendix D. As a matter of practicality, as well as a matter of law, the Fourth District's decision in this case was that of the "highest state court" with jurisdiction to hear Advantage's appeal.

"floating" development rights created by a governmental entity have compensable value when those rights are taken from the private owner thereof in eminent domain?

A. A Governmental Taking of "Development Rights" is a Taking of Property Rights.

The City's development order conferred on the original DRI developer the right "to construct 3.7 million square feet of office space, 190,000 square feet of retail, 800 hotel rooms, and 1,000 dwelling units" on the 77-acre property comprising the DRI. Appendix F. With the exception of a small area in which non-residential development is barred, the development rights conferred by the DRI are not tied to any particular parcel of land. *Id.* Rather, applications for site plan approval must be submitted to the City for each proposed linkage between the development rights and a particular parcel of real property within the DRI. So it is that the development rights conferred by the DRI are seen by the Florida courts as "'floating' development rights." Appendix D. By the decisions in this case, the Florida courts have established that government may take such "floating" development rights without paying *any* compensation therefor — because such rights "do not exist separate and apart from the underlying realty" and "have *no value*." Appendix A (emphasis supplied).

The notion that development rights may exist separate and apart from real property is, however, inherent in this Court's depiction of the very concept of "property" as a "bundle of rights." *Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979). Thus, "in law ... property is not things but rights, rights in or to things," and "the bundle of rights idea of property can contain many strands," *e.g.*, "the exclusive right, the use right, air rights, support rights, quiet enjoyment rights, waste rights, and so on." Maureen S. Kordesh, *"I Will Build My House With Sticks": The Splintering of Property Interests Under the Fifth Amendment May be Hazardous to Private Property,* 20 HARV. ENVTL. L. REV. 397, 451 & n.299 (1996) (hereinafter *Splintering of Property Interests*). Simply stated, "property" cannot be defined as "land" alone:

> Instead of defining the relationship between a person and "his" things ... the law of property considers the way rights to things may be parceled out amongst a host of competing resource users. Each resource user is conceived as holding a bundle of rights vis-a-vis other potential users; indeed in the modern American system, the ways in which user rights may be legally packaged and distributed are wondrously diverse ....

BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10 (1977) (hereinafter ACKERMAN). This Court recently has reaffirmed this classic definition of property in *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 118 S. Ct. 1925, 1933 (1998).

That is, "[c]onceiving of property as things conjures up the idea that there must be a single owner who holds some standard set of rights over a thing," a notion that "is inadequate to describe the legal realities of the property system." Leif Wenar, *The Concept of Property and the Takings Clause,* 97 COLUM L. REV. 1923, 1927 (1997) (hereinafter *Property and the Takings Clause*). "[T]he law of property concerns itself with bundles of user-rights, not with the awkward idea that things 'belong to' particular people." ACKERMAN, *supra* at 114-15.

"Property," in its most realized sense, means *both* "the corporeal object which is the subject of ownership, as well as the *aggregate* rights which an owner possesses in or with respect to such a corporeal object." JULIUS L. SACKMAN, 2 NICHOLS' LAW OF EMINENT DOMAIN, § 5.01[1] (3rd ed. 1995) (footnotes omitted) (hereinafter NICHOLS). That being so, the right to *develop* property "is a recognized property right and is subject to the power of eminent domain." 2 NICHOLS, § 5.28.

This Court has recognized that, among the economic units included in the "bundle of rights" is the right to *develop* one's land. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1019 n.8 (1992) (noting that "our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land");

Nollan v. California Coastal Commission, 483 U.S. 825, 833 n.2 (1987) ("the right to build on one's own property — even though its exercise can be subjected to legitimate permitting requirements — cannot remotely be described as a 'governmental benefit'").[5] Indeed, the recognition of such an inchoate right is all but commanded by the classic formulation of takings law in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), in which decision Justice Holmes declared that the destruction of "previously existing rights of property *and contract*" requires "an exercise of eminent domain and compensation to sustain the act" when

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[5] Development rights are the modern descendant of "air rights" conferred on landowners under the rubric of *cujus est solum, ejus est usque ad coelum et ad inferos*, or "to whomsoever the soil belongs, he owns also to the sky and to the depths." *Macmillan, Inc. v. CF Lex Associates*, 56 N.Y.2d 386, 452 N.Y.S.2d 377, 437 N.E.2d 1134, 1137 (1982) (citations omitted). With the advent of air travel, "air rights" came to mean that "the landowner ... must have exclusive control of the immediate reaches of the enveloping atmosphere." *United States v. Causby*, 328 U.S. 256, 264 (1946). This Court declared that "[t]he landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." *Id.* (citation omitted). Thus, "[a]ir rights are incident to the ownership of the surface property — the right of one who owns land to utilize the space above it." *Macmillan*, 437 N.E.2d at 1137. Development rights are viewed as an aspect of "air rights," *i.e.*, "the right of an owner to develop within [the] airspace." 2 NICHOLS, § 5.28

the diminution of value "reaches a certain magnitude." *Id.* at 413 (emphasis supplied).[6]

With the *Lucas* and *Nollan* decisions, this Court not only reaffirmed that the opportunity to develop one's land is included in the "bundle of rights," but elevated the status of development rights. Richard M. Frank, *Inverse Condemnation Litigation in the 1990s — The Uncertain Legacy of the Supreme Court's Lucas and Yee Decisions*, 43 WASH. U. J. URB. & CONTEMP. L. 85, 108-09 (1993). The preeminence of development rights is to be expected in a market-driven economic structure:

> The ownership of property, in and of itself, is of little value to an individual. Instead, *it is the owner's ability to put that property to a particular use* that creates value in property.

Joseph D. Stinson, Note and Comment, *Transferring Development Rights: Purpose, Problems & Prospects in New York*, 17 PACE L. REV. 319, 322 (1996) (emphasis supplied; footnote omitted) (hereinafter *Transferring Development Rights*). So it is that "other than in most agricultural and mining areas, the right to develop *is probably the component of greatest value among the rights to ownership.*" MARTIN A. GARRET, JR., LAND USE REGULATION: THE IMPACTS OF ALTERNATIVE LAND USE RIGHTS 76 (1987) (hereinafter GARRET) (emphasis supplied); *accord*, 2 NICHOLS, § 5.28[1] n.8 ("[it] seems clear that the greatest component of value of ...

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[6] This Court's takings decisions historically have recognized that both tangible *and* intangible property interests may be "taken" so as to entitle the holder of the interest to compensation. *E.g., Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 2147-49 (1998) (employer's liability for health benefits); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-03 (1984) (trade secrets); *Armstrong v. United States*, 364 U.S. 40, 44-46 (1960) (materialmen's liens); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935) (real estate liens); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (contracts).

undeveloped land in an urban area would be the development rights").

The central tenet of the Florida courts' rulings on Advantage's development rights runs completely counter to the very *definition* of "property" and to this Court's firm recognition that development rights *are* "property" under the Takings Clause. The notion that a governmental entity can confer on a property owner clearly-stated rights to develop the property in certain ways and, upon taking those rights in an eminent domain proceeding, be exempt from the constitutional requirement of paying just compensation, is breathtaking in its potential for depriving private property owners of rights that appertain to their property without *any* obligation on the government's part to pay just compensation.

B. The Decision of the Florida Courts to Allow Uncompensated Takings of "Floating" Development Rights is in Conflict With This Court's Precedent on the Value of Severable Development Rights.

1. The severability of property rights.

In *Nollan*, this Court expressly acknowledged the severability of property rights. The Court struck down a condition that had been imposed on the landowner's right to develop beachfront property, which condition required dedication of a right of public access through the property. The Court construed the mandatory easement as a separately-taken right, independent of the parcel of land:

> To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather ... "a mere restriction on its use" is to use words in a manner that deprives them of all their ordinary meaning.

483 U.S. at 831.

The *Nollan* analysis has been labeled as "conceptual severance," *i.e.*, "delineating a property interest consisting

of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken." Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) (hereinafter *Cross Currents*). Because each "stick" in the "bundle of rights" is "property," then "removing a stick from someone's bundle must be a taking regardless of what other sticks remain in the person's bundle (if any)." *Property and the Takings Clause, supra* at 1928 (footnote omitted). The *Nollan* framework thus "conceptually 'severs' from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing." *Cross Currents, supra* at 1676.[7] Like other rights in the "bundle of sticks" that constitute property, "development rights are property rights that can be severed from land and sold." Sarah J. Stevenson, *Banking on TDRs: The Government's Role as Banker of Transferable Development Rights*, 73 N.Y.U. L. REV. 1329 (1998) (hereinafter *Banking on TDRs*).

2. The value of transferable development rights.

Transferable development rights (TDRs) are a well-recognized mechanism that is used to separate development rights from real property. TDRs are employed to limit development in sensitive or overcrowded areas by transferring rights to develop in such areas to real property

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[7] The rationale for *Nollan* also has been interpreted as market-driven, *i.e.*, if an economic unit of property can be exchanged for value, that unit may be severed from the "bundle of rights." *The Splintering of Property Interest, supra* at 427, 433-34. The New York Court of Appeals took that view of *Nollan* in *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059, *cert. denied*, 493 U.S. 976 (1989), holding that "development rights which have been totally abrogated ... are, *standing alone*, valuable components of the 'bundle of rights'" that constitute property. *Id.* at 1067-68 (emphasis supplied).

located in areas more conducive to further development. John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 85-86 (1973). Thus, "[b]orrowing from the metaphor of property as a bundle of sticks, such programs classify the right to develop as a stick capable of being severed from geographically specific sites and sold like a fungible commodity." Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. ENVTL. AFF. L. REV. 565, 574-75 (1992) (footnote omitted) (hereinafter *Market-Based Regulatory Approaches*). TDR programs "are premised on the notion that development rights in land *are themselves distinct property entities* and, as such, are *freely separated from conventional rights of ownership.*" Judith W. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 1002 n.265 (1987) (citation omitted; emphasis supplied) (hereinafter *Contract Zoning*).

This Court first addressed TDRs in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). New York City has been "the nation's laboratory" for TDR experimentation since that city's adoption of its first modern zoning code in 1961. David A. Richards, *Downtown Growth Control Through Development Rights Transfer*, 21 REAL PROP. PROB. & TR. J. 435, 437 (1986). TDRs were originally used in New York to allow the transfer of development rights between contiguous parcels, and, under a 1968 amendment, "landmark" buildings were permitted to transfer unused "air rights" to a site across a street from the "landmark" building. Margaret Giordano, Note, *Over-Stuffing the Envelope: The Problems with Creative Transfer of Development Rights*, 16 FORDHAM URB. L.J. 43, 47 (1988) (hereinafter *Creative Transfer*). *Id.*[8]

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[8] TDRs have been used successfully to preserve New Jersey's Pinelands wilderness area through the granting of TDRs to landowners in areas of limited development. James T. B. Tripp & Daniel J. Dudek, *Institutional Guidelines for Designing*

(continued . . .)

In *Penn Central*, this Court addressed New York's TDR program for preservation of municipal landmarks. The dispute arose from proposals to use the "air rights" over Grand Central Terminal for a multi-story office building above the terminal. 438 U.S. at 115-18. The City refused to allow the new building, largely because of its incompatibility with the historic terminal, and granted Penn Central TDRs that could have been used to develop office buildings on other properties owned by Penn Central. *Id.* at 116-19. Pressing its claim of a taking without just compensation, Penn Central conceded that the TDRs "are valuable," but asserted that a taking nonetheless had occurred. *Id.* at 129.

The Court held that denying Penn Central "the ability to exploit a property interest that they heretofore had believed was available for development" did not itself constitute a taking. 438 U.S. at 130. Additionally, Penn Central was permitted under the New York law to continue using the terminal "precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions." *Id.* at 136. Finally, while declining to address the question whether TDRs may constitute "just compensation" under the Fifth Amendment (because no "taking" that would entitle Penn Central to compensation had yet occurred), *id.* at 122, the Court relied on the value of the TDRs granted to Penn Central to bolster its conclusion that a taking had not occurred:

(. . . continued)

Successful Transferable Rights Programs, 6 YALE J. ON REG. 369, 378-80 (1989). The Pinelands program grants credits to landowners, which credits can be sold to developers for use in obtaining additional density in growth areas of the state. *Id.* at 378. Other successful TDR programs are operating in New Jersey's Hackensack Meadowlands, the Long Island Pine Barrens of New York, the Santa Monica Mountains, and the eastern boundary of the Florida Everglades. Julian C. Juergensmeyer, James C. Nicholas & Brian D. Leebrick, *Transferable Development Rights and Alternatives after Suitum*, 30 URB. LAW. 441, 448-55 (1998).

> [T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied all use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

Id. at 137 (citation and footnote omitted). This Court's "implicit acceptance of TDRs in *Penn Central* was an extremely important step for TDRS" because the decision "signaled to New York City, and the rest of the country, not only that this new form of TDR was an acceptable land use tool, but also that TDRs *had some recognizable value* that could mitigate financial hardship." *Banking on TDRs, supra* at 1336 (footnote omitted; emphasis supplied).

This Court's decision in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659 (1997), reaffirms that TDRs are separately valuable, with their value subject to reasonable calculation. *Suitum* arose from a landowner's takings claim, which claim resulted from an interstate agency's ruling that her Nevada property was not subject to development because of its location in an environmentally sensitive area. 117 S. Ct. at 1161-63. The landowner received TDRs as compensation for the ruling by the agency, but brought her takings action prior to making any effort to market the TDRs. *Id.* at 1663-64. The Court addressed the question whether the landowner's

"claim of a regulatory taking of her land ... is ready for judicial review under prudential ripeness principles." *Id.* at 1664 (footnote omitted). In holding that the claim was ripe, the landowner's decision not to market the TDRs notwithstanding, the majority opinion addressed the agency's argument that the claim was not ripe because no precise values could be attributed to the TDRs. *Id.* at 1668.

The Court recognized that "TDRs may be bought and used for the benefit of all sorts of land parcels and lots." *Id.* at 1668. The agency's argument was thus rejected because, as the Court held, "[t]he valuation of Suitum's TDRs is ... simply *an issue of fact* about possible market prices." *Id.* (emphasis supplied). While Justice Scalia's separate opinion argues that the value of Suitum's TDRs is irrelevant to the question of ripeness and that the TDRs should be considered only in determining the amount of compensation to which Suitum should be entitled, *id.* at 1670-72, both the majority and Justice Scalia *agreed* on the answer to the underlying question, *i.e.*, whether TDRs have inherent value in the first instance. As Justice Scalia observes:

> TDRs, of course, have nothing to do with the use or development of the land to which they are (by regulatory decree) "attached." The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop his land. *The latter is valuable, to be sure,* but it is a new right conferred upon the landowner in exchange for the taking, rather than a reduction of the taking. In essence, the TDR permits the landowner whose right to use and develop his property has been restricted or extinguished to extract money from others ....
>
> * * *
>
> ... TDRs can serve a commendable purpose in mitigating the economic loss suffered by an individual whose property use is restricted, and property value diminished, but not so substantially as to produce a compensable

> taking. They may also form a proper part, or indeed the entirety, of the full compensation accorded a landowner when his property is taken ....

Id. at 1671-72 (emphasis supplied). The disagreement over the proper placement of TDRs in the context of a regulatory taking notwithstanding, the Court thus spoke with a single voice in *Suitum* on the question whether TDRs are *valuable property rights*.

3. The conflict with this Court's precedent on this important takings issue warrants a grant of certiorari.

The Florida courts' rulings in this case cannot be reconciled with this Court's decisions in *Penn Central* and *Suitum*.[9] The CRA's eminent domain petition sought to condemn "all *rights of development* appertaining to [the DRI] property" pursuant to the ordinance that adopted the development order. Appendix G (emphasis supplied). The state court's initial order of taking expressly provides that the CRA took *Advantage's development rights*, as assigned in the various agreements that led to Advantage's

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[9] The initial opinion by the Fourth District Court of Appeal strongly suggests that the existence of a TDR ordinance in the jurisdiction that confers severable development rights is dispositive of the question whether those rights have value upon a taking thereof in an eminent domain proceeding. Appendix A. When the anomaly of such a holding was raised by Advantage on rehearing, the court stated that its decision did *not* hold that "the existence of an enactment controlling the transfers of development rights ... is a prerequisite to a *compensable* taking of so-called 'floating' development rights," but rather that the decision had been "predicated entirely on the specific language of the subject DRI Development Order." Appendix D. This is a distinction without a meaningful difference: either way, the court is saying that the absence of an express creation of TDRs by a local governmental body is dispositive of the question whether a taking of development rights is compensable.

acquisition of the original developer's rights. Appendix E. The question thus presented is *not* whether, as in the regulatory-takings scenario, a "taking" of property has occurred. Rather, the *only* question is whether property that indisputably has been taken by a governmental entity has compensable value. *See, e.g., Yee v. City of Escondido,* 503 U.S. 519, 522 (1992) (just compensation clause is implicated by physical seizure *or* the taking of title thereto).

The only conceivable distinction between TDR exchanges and more informal transfers of development rights, such as occurred in the present case, is that the latter transaction is entirely private and takes place without the need for government intervention.[10] A property owner's Fifth Amendment right to just compensation for property that is taken by the government cannot rest upon whether the condemning entity formally has recognized the transaction by which the owner obtained the property being taken by the government. *See Phillips,* 118 S. Ct. at 1931 (government "may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law").

By their very nature, "TDR programs *separate the development potential from the land itself* and create a market where that *development potential* can be sold." Julian C. Juergensmeyer, James C. Nicholas & Brian D. Leebrick, *Transferable Development Rights and Alternatives after Suitum,* 30 URB. LAW. 441, 446 (1998) (footnote omitted; emphasis supplied). TDRs are thus nothing more or less than development rights created by

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[10] Indeed, it cannot escape notice that the development rights obtained by Advantage were thereafter transferred by Advantage to another property owner within the DRI — at the urging of the City of West Palm Beach, which was seeking to resolve outstanding claims against the original development. Appendix O. The City was fully aware of Advantage's acquisition and marketing of the development rights and professed, at least at one point, its intention to pay Advantage "fair market value" for any development rights that the City thereafter sought to acquire. Appendix R.

governmental action that "effectively equal the traditional right to use or develop real property." Franklin G. Lee, *Transferable Development Rights and the Deprivation of All Beneficial Use: Can TDRs Salvage Regulations That Would Otherwise Constitute a Taking?*, 34 IDAHO L. REV. 679, 707 (1998).

The close relationship between TDRs and Advantage's "floating" development rights is highlighted in a discussion of the Lake Tahoe Basin land-use restrictions following this Court's *Suitum* decision. Michael B. Hitchcock, *Suitum v. Tahoe Regional Planning Agency: Applying the Takings Ripeness Rule to Land Use Regulations and Transferable Development Rights*, 28 GOLDEN GATE U. L. REV. 87 (1998) (hereinafter *Applying the Takings Ripeness Rule*). As noted in the discussion of the DRI development order, the development rights conferred therein do not attach to a particular parcel until site plan approval is granted for a specific development. Appendix F. Similarly, TDRs in the Lake Tahoe Basin are "a development right because they represent a fractional share of the cumulative development allowed for the entire region." *Applying the Takings Ripeness Rule, supra* at 110. When allocated "to individual parcels," the TDRs "may then become vested property rights upon development application approval." *Id.* Stated otherwise, TDRs — like Advantage's development rights — begin as *unattached* rights that pertain to a *region* that is subject to governmental regulation, and only become actualized upon governmental approval for application to a particular parcel of land. There is thus neither a conceptual nor a legal distinction between TDRs and Advantage's rights for the purpose of a takings analysis.

If indeed TDRs have calculable value, as this Court has held that they do in *Penn Central* and *Suitum*, the holding below that Advantage's "floating" development rights, which rights were created by the ordinance establishing the DRI, cannot have any value is in direct and irreconcilable conflict with this Court's takings precedent. It cannot be overlooked that the DRI ordinance that created the development rights expressly contemplated that those rights *would be subject to assignment*. Appendix F. Prior

to the taking of its development rights by the CRA, Advantage was in possession of *valuable rights* — as is irrefutably established by Advantage's sale of portions of its rights on the open market. After the taking, Advantage's development rights were somehow deemed to be of *no value,* such that the government was able to bar Advantage from proving the value of the taken rights before a jury.

The importance of the question presented by this case and the conflict with this Court's precedent warrant review by this Court. State and local governments are making frequent use of development agreements, similar to the DRI development order at issue in this case, as land-use planning tools. *Contract Zoning, supra* at 994-98. Development agreements are used, among other things, to facilitate the preservation of agricultural land, and — as here — "to foster community redevelopment." *Id.* at 994-95. Such agreements are intended "to increase certainty concerning the rights of developers — an objective that is satisfied only by the recognition of protected property or contract rights — and to facilitate the production of needed public infrastructure an other benefits — arguably above and beyond that which the local government could exact under the police power." *Id.* at 999-1000 (footnote omitted). If a governmental change of heart, as expressed in an eminent domain action, can strip away valuable development rights conferred by a development order or agreement without the need of just compensation, the utility of this valuable planning tool will be significantly limited, if not all but destroyed.

Moreover, the decision below, if left undisturbed, could have a negative impact on the development of TDR programs as well. Despite the value of TDRs in fostering "a variety of preservation efforts, including the preservation of historic landmarks, valuable ecosystems, agricultural land, open space, and low-income housing," governmental use of TDRs continues to encounter obstacles, "the most significant of which is difficulty in valuation." *Banking on TDRs, supra* at 1331 & n.10. Landowners often find it difficult to locate willing buyers for TDRs conferred by government as compensation for regulatory takings, due in part to the absence of an

established exchange and also to the reluctance of other landowners to purchase TDRs. *Id.* at 1331. The added uncertainty that is created by allowing the government to use its power of eminent domain specifically to take back rights that it bestowed on a property owner, without the government also being subject to the just compensation requirements of the Fifth Amendment, will thwart efforts to use this "desirable land use tool," *Banking on TDRs, supra* at 1331, for legitimate public purposes.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Dated: March 12, 1999

APPENDIX

APPENDIX A — OPINION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOR THE FOURTH DISTRICT DATED AND FILED OCTOBER 14, 1998

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT JULY TERM 1998

ADVANTAGE WEST PALM BEACH, INC., BERT MOERINGS, and MARSHA MOERINGS,

Appellants,

v.

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, INC.,

Appellee.

CASE NO. 97-3525

Opinion filed October 14, 1998

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Edward Fine, Judge; L.T. Case No. CL 96-5381 AI.

* * *

Appendix A

PER CURIAM.

The issue in this case is whether appellants are entitled to compensation for certain "development rights" as part of a taking in eminent domain. Appellants contended that these development rights were created by City of West Palm Beach Ordinance No. 2268-89, as amended, referred to as the Downtown Uptown Development of Regional Impact ("DRI"). After a three-day trial on this issue, the trial court entered a concise, well reasoned final judgement which held:

> The development rights in question have no value. They were not created by the enactment of the DRI. They do not exist separate and apart from the underlying realty. They were not severable from the realty.
>
> Neither the City nor the Community Redevelopment Agency is estopped in any way from contesting the assignability or value of the subject development rights assigned to Advantage.
>
> These "rights" did not exist to be transferred or assigned.
>
> [Appellants], Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings hold no separate, compensable property interest known as development rights, are due no compensation from the West Palm Beach Community Redevelopment Agency and hold no apportionment claim against the owners of land within the DRI.

Appendix A

We agree with the final judgment entered by the trial court. The DRI did not create a species of property known as transferrable development rights. Unlike Palm Beach County, the City of West Palm Beach has never adopted a Transfer of Development Rights Ordinance. Neither the language of the DRI, nor the development process contemplated by the ordinance, support the conclusion that transferrable development rights were created for which appellants are entitled to be compensated. The opaque references by the City's attorney during a closing argument in a different case did not give rise to an estoppel against inconsistent positions. This is not the rare and exceptional case that justifies the application of the doctrine of equitable estoppel. *See State Dep't of Revenue v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981).

AFFIRMED.

POLEN, GROSS and TAYLOR, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

APPENDIX B — JUDGMENT REGARDING DEVELOPMENT RIGHTS OF THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA DATED SEPTEMBER 22, 1997

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CL 96-5381 AI

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY,

Plaintiff,

vs.

ADVANTAGE WEST PALM BEACH, INC., et al.,

Defendants.

JUDGMENT REGARDING DEVELOPMENT RIGHTS

This cause came before the Court pursuant to a non-jury trial conducted on August 18, 19 and 25, 1997. The purpose of the trial was to resolve whether development rights created pursuant to City of West Palm Beach Ordinance No. 2268-89, and the amendments thereto (i.e., City of West Palm Beach Ordinance Nos. 2287-89 and 2313-89), regarding the Downtown Uptown Development of Regional Impact (the "DRI"), constitute a type of property interest, apart from the realty within the DRI, with respect to which Petitioner, the

Appendix B

West Palm Beach Community Redevelopment Agency ("Petitioner"), is required to provide "full compensation" under Article X of the Florida Constitution.

On or about January 6, 1997, the Court entered an Agreed Order of Taking whereby Petitioner obtained title to certain real property belonging to: Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings (collectively, Advantage), along with "all development, contract and other rights held, or allegedly held, by Defendant, Advantage West Palm Beach . . ." pursuant to Florida Statutes Chapter 74. (Order of Taking, ¶5, pp. 8-9). On or about March 26, 1997, the City filed a motion *in limine* wherein it asserted that "numerous issues exist in this cause as to the validity and effect, if any, of the . . . purported assignments of development rights" to Advantage. (Pet.'s Mot., p.3). The City's motion further asserted that "as a matter of law" the Court is required to determine prior to the trial of this case:

A. Whether the so-called development rights could have been severed from the underlying real estate within the DRI;

B. Whether development rights are a species of property which may exist independent of any real property when all of the real property has been transferred to others;

C. Whether the purported assignments of development rights were and continue to be valid; and

D. Whether the parties must value the so-called development rights as severed from the realty and compensate Defendant, Advantage West Palm Beach, therefore.

(Pet.'s Mot., ¶ 8, pp. 3-4).

In response to Petitioner's motion *in limine*, Advantage asserted a series of fundamental procedural and substantive objections contending that Petitioner was attempting by its motion *in limine* to thrust wrongfully upon Advantage a trial under the guise of a motion *in limine* without the basic notice (or discovery) required by the Florida Rules of Civil Procedure. At the May 20, 1997 hearing on Petitioner's motion *in limine*, the Court acknowledged the propriety of Advantage's objections and determined that a properly noticed trial on the matters raised by Petitioner's motion was necessary. The Court allowed sufficient time for discovery and preparations to be completed.

Land regulation constitutes an exercise of the police power of government. The development order in this case restricts the use of private property. In this instance the development order authorized certain densities for both commercial and residential use. The development order did not actually place specific densities on specific properties but, with the exceptions of Blocks 3 and 10 which were close to a residential area, it merely allocated total densities for the area in general. Any developer of the property within the DRI would still have to obtain site plan approval for any specific land development contemplated.

Appendix B

Prior to the mortgaging of any of the property in question the development order was enacted as a municipal ordinance and was a matter of public record. The development order does not contain the term "development rights". It does not address development rights at all. It does not make any provisions for the transfer of development rights or for their severance or separation from the underlying real estate. The City of West Palm Beach has never adopted an ordinance permitting or regulating the transfer of development rights.

Shortly after the adoption of the development order in March 1989, the original developer entered into several mortgage transactions. Every one of these mortgage transactions pledged fee simple title as security for these loans. Thereafter the project became financially troubled. Ultimately the mortgages were foreclosed. All title presently held by all the interested land owners was acquired by these mortgage foreclosures or by subsequent purchase of title acquired by means of these mortgage foreclosures.

After the passage of the development order, and after execution of the mortgages but before the mortgages were foreclosed, the original owners of the property conveyed the development rights which are the subject of this Judgment, to Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings. Defendants own about 5% of the land within the DRI but they claim to own approximately 90% of all development rights.

Advantage claims that the City has acknowledged in their dealings with land owners that these rights have value by requiring that owners obtain development rights from

Advantage or litigate the matter. Advantage sold development rights to Babcock's Economy Furniture Stores, Inc., a land owner within the DRI that was in the process of obtaining approval for the construction of a large office building. The Court finds that the City has not recognized any development rights but instead recognized that the claim that development rights existed clouded the land titles within the DRI so that the parties were obligated to either litigate the matter or reach an agreement with Advantage since either action resolved the title issue.

First Union Bank by a related entity known as O.R.E.O., Inc. acquired 50,000 square feet of development rights from Advantage. This was acquired as part of a settlement that involved the City, First Union and Advantage. Again since the validity of the claim of Advantage was undetermined, either O.R.E.O, Inc. would have to undertake its own litigation to obtain a judicial determination, or satisfy Advantage so that there could be no potential claim by Advantage.

The City's position in the litigation of the Okeechobee corridor was that if the parcels in question were owned by one entity, its development rights could be placed on the various parcels according to the owner's discretion, provided that development did not exceed the maximum allowed by the DRI. This is not inconsistent with the City's present position. Consequently, there is no estoppel operating against the City.

The assignments of development rights were acquired without the consent of any of the mortgage holders, and

without the consent of the City of West Palm Beach. Many of the assignments were unrecorded and would not surface in a normal title examination. If these development rights in fact remove the right of an owner to develop property then Advantage without purchasing any of the land in question would be in a position to prohibit the owners from the development of their land.

The Court finds that the prior unitary owners within the DRI having pledged fee simple title to their mortgagees, could not strip off development rights. Development rights were not separate intangibles created by the passage of the DRI.

CONCLUSIONS OF LAW:

The development rights in question have no value. They were not created by the enactment of the DRI. They do not exist separate and apart from the underlying realty. They were not severable from the realty.

Neither the City nor the Community Redevelopment Agency is estopped in any way from contesting the assignability or value of the subject development rights assigned to Advantage.

These "rights" did not exist to be transferred or assigned.

Defendants, Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings hold no separate, compensable property interest known as development rights, are due no compensation from the West Palm Beach Community Redevelopment Agency and hold no

apportionment claim against the owners of land within the DRI.

ORDERED AND ADJUDGED at West Palm Beach, Florida, this 22 day of September, 1997.

s/ Edward Fine
EDWARD FINE
Circuit Judge

APPENDIX C — ORDER ON PETITIONER'S MOTION IN LIMINE OF THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA DATED SEPTEMBER 22, 1997

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CL 96-5381 AI

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY,

Plaintiff,

vs.

ADVANTAGE WEST PALM BEACH, INC., et al.,

Defendants.

ORDER ON PETITIONER'S MOTION IN LIMINE

This action came before the Court on August 18, 19 and 25, 1997 on Petitioner's Motion in Limine. The motion raises the question: whether or not the Defendants, Advantage West Palm Beach, Inc., Burt Moerings and Marsha Moerings may present a claim to the jury for compensation for certain claimed real and intangible property interests designated by them as development rights. Pursuant to the decision of the Court regarding those rights, finding that they have no compensative value, the motion seeking to prohibit the introduction of this claim to the jury is hereby granted.

Appendix C

ORDERED at West Palm Beach, Florida, this 22 day of September, 1997.

s/ Edward Fine
EDWARD FINE
Circuit Judge

APPENDIX D — OPINION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOR THE FOURTH DISTRICT DENYING REHEARING DATED AND FILED DECEMBER 16, 1998

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT JULY TERM 1998

ADVANTAGE WEST PALM BEACH, INC., BERT MOERINGS, and MARSHA MOERINGS,

Appellants,

v.

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, INC.,

Appellee.

CASE NO. 97-3525

Opinion filed December 16, 1998

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Edward Fine, Judge; L.T. Case No. CL 96-5381 AI.

* * *

Appendix D

ON MOTION FOR REHEARING AND/OR EN BANC REHEARING AND FOR CERTIFICATION

PER CURIAM.

Appellants' motions for rehearing, rehearing en banc, and for certification are denied. Appellants misread the panel opinion when they assert that the decision "plainly states that the existence of an enactment controlling the transfers of development rights (TDRs) is a prerequisite to a *compensable* taking of so-called "floating" development rights." As appellee correctly points out, the panel opinion is "predicated entirely on the specific language of the subject DRI Development Order."

POLEN, GROSS and TAYLOR, JJ., concur.

APPENDIX E — EXCERPTS FROM AGREED ORDER OF TAKING OF THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY DATED JANUARY 6, 1997

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY.

CASE NO. CL 96-5381 AI

Parcels 701, 707, 709, 6904, RB-1, RB-2,
RB-4, RB-5, RB-6 and Claims to Development
and Other Rights Under DRI

WEST PALM BEACH COMMUNITY
REDEVELOPMENT AGENCY,

Petitioner,

vs.

ADVANTAGE WEST PALM BEACH, INC., et al.,

Respondents,

AGREED ORDER OF TAKING

THIS CAUSE came before the Court under the Petition in Eminent Domain, Amendment to Petition in Eminent Domain and Answer with Affirmative Defenses filed by Defendant, ADVANTAGE WEST PALM BEACH, INC., BERT MOERINGS and MARSHA MOERINGS, (hereinafter

collectively referred to as ADVANTAGE WEST PALM BEACH), and it appearing that proper notice was first given to all the Defendants and to all persons having or claiming any equity, lien, title or other interest in or to the property described herein that the Petitioner would apply to this Court for an Order of Taking and upon agreement of Petitioner and Defendant, ADVANTAGE WEST PALM BEACH, and the Court being fully advised in the premises, upon consideration, it is, therefore,

ADJUDGED:

1. That the Court has jurisdiction of the subject matter of and the parties to this cause;

2. That the pleadings in this cause are sufficient, and the Petitioner is properly exercising its delegated authority;

3. That each Estimate of Value filed in this cause by the Petitioner was made in good faith and based upon a valid appraisal;

4. That upon the payment of the deposit hereinafter specified into the Registry of this Court, fee simple title shall vest in the Petitioner in the following properties:

* * *

5. That a dispute exists between the parties hereto as to the ownership, validity and value, if any, of certain development rights, contract rights and other rights allegedly owned by Defendant, ADVANTAGE WEST PALM BEACH,

pursuant to the Downtown/Uptown Development of Regional Impact as adopted by City of West Palm Beach Ordinance No. 2268-89, as amended, and as more fully set forth by ADVANTAGE WEST PALM BEACH in its Answer filed herein. It is agreed that upon payment of the total sum of money set forth in Paragraph 7 below that full and complete title to all development, contract and other rights held, or allegedly held, by Defendant, ADVANTAGE WEST PALM BEACH, pursuant to the development of regional impact, as amended, shall vest in Petitioner, including but not limited to, all rights allegedly held by Defendant, ADVANTAGE WEST PALM BEACH, pursuant to the following:

A. Absolute Assignment of Development Rights as recorded in Official Record Book 8557, page 267 of the Public Records of Palm Beach County, Florida.

B. Absolute Assignment of Development Rights as recorded in Official Record Book 8557, page 269 of the Public Records of Palm Beach County, Florida.

C. Assignment of Contract Rights as recorded in Official Record Book 9261, page 367 of the Public Records of Palm Beach County, Florida.

D. First Amendment Assignment of Contract Rights and Clarification of December 22, 1994 Assignment of Contract Rights as recorded in official Record Book 9261, page 431 of the Public Records of Palm Beach County, Florida.

E. Certificate of Title as recorded in official Record Book 9302, page 1824 of the Public Records of Palm Beach County, Florida.

Appendix E

F. Absolute Assignment of Development Rights as recorded in Official Record Book 9308, page 1420 of the Public Records of Palm Beach County, Florida.

G. Any and all rights and all rights and property interests, if any, pursuant to an unrecorded Quit Claim Deed from Donald F. Mintmire, Trustee dated December 23, 1994.

H. Any and all rights, if any, of ADVANTAGE WEST PALM BEACH, to all alleged impact fee waiver as described in Paragraph 7 (B)(7) of Defendants' Answer herein.

By stipulating to this Agreed Order of Taking, Defendant, ADVANTAGE WEST PALM BEACH, specifically does not waive any right to full or just compensation for real property, development rights, contract rights or other rights subject to or impacted by this eminent domain proceeding as may later be determined by the Court or a jury herein with respect to any properties that are or are not included in this eminent domain proceeding but are located within the boundaries of the downtown/uptown development of regional impact. Further, by stipulating to this Agreed Order of Taking, Petitioner does not waive any right to argue or contend that Defendant is not the lawful owner of said rights, that said rights were not validly assigned, that said rights have no value or any other defense that may be asserted by Petitioner to the same. It is the express intention of Petitioner and ADVANTAGE WEST PALM BEACH that upon compliance with the terms of this Order, all ownership, right, title or interest of ADVANTAGE WEST PALM PEACH in real

property or property of any nature, including but not limited to development rights, located within the Downtown/Uptown development of regional impact or otherwise related or pertaining to said development shall vest in Petitioner and Defendant shall in the future assert no claim to the same.

6. That the deposit of money will secure the persons lawfully entitled to the compensation which will be ultimately determined by final judgment of this Court;

7. That the sum of money to be deposited in the Registry of the Court within twenty (20) days of the entry of this Order, shall be in the amount of:

Parcel 701	$ 206,000.00
Parcel 707	91,000.00
Parcel 709	93,000.00
Parcel 6904	82,000.00
Parcel RB 1	480,500.00
Parcel RB 2	338,500.00
Parcel RB 4	144,000.00
Parcel RB 5	291,000.00
Parcel RB 6	185,000.00
TOTAL	$ 1,911,000.00

8. That on deposit as set forth above and without further notice or Order of this Court, the Petitioner shall be entitled to possession of the property as described herein.

9. Petitioner and Defendant, CITY OF WEST PALM BEACH, shall not object to the withdrawal of funds to be deposited in accordance with this Order provided payment is

made of all current and back taxes. Petitioner and Defendant, CITY OF WEST PALM BEACH, waive any rights they may have against ADVANTAGE WEST PALM BEACH regarding Code Enforcement Liens on the property described herein.

DONE AND ORDERED this 6 day of January, 1997, in the State of Florida, County of Palm Beach.

s/ E Fine (copy)
Circuit Judge

APPENDIX F — EXCERPTS FROM ORDINANCE NO. 2268-89 OF THE CITY OF WEST PALM BEACH, FLORIDA DATED MARCH 20, 1989

ORDINANCE NO. 2268-89

AN ORDINANCE OF THE CITY COMMISSION OF THE CITY OF WEST PALM BEACH, FLORIDA, RELATING TO A DEVELOPMENT OF REGIONAL IMPACT KNOWN AS "DOWNTOWN UPTOWN;" MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW PERTAINING TO DOWNTOWN UPTOWN, ESTABLISHING DEVELOPMENT LIMITATIONS, RESTRICTIONS AND CONDITIONS RELATING TO APPLICATIONS, COMMENCEMENT, AIR, HISTORIC AND ARCHEOLOGICAL SITES, HABITAT, VEGETATION AND WILDLIFE, DRAINAGE, WATER SUPPLY: POTABLE AND NON-POTABLE WATER, HAZARDOUS MATERIALS AND WASTE, WASTEWATER, EDUCATION, POLICE AND PUBLIC SAFETY, FIRE PROTECTION, ENERGY, TRANSPORTATION, HOUSING, CONVERSION OF USES, SITE PLAN REVIEW, LAND USE DISTRIBUTION, DEMOLITION OF EXISTING STRUCTURES, SUBDIVISION OF LAND, RIGHT-OF-WAY ABANDONMENT, LANDSCAPING AND TREE PROTECTION, DESIGN REQUIREMENTS, PARKS AND CAPITAL FACILITIES CONSTITUTING THIS ORDINANCE AS A DEVELOPMENT ORDER BY THE CITY OF WEST PALM BEACH IN COMPLIANCE WITH LAW; PROVIDING AN EFFECTIVE DATE; PROVIDING A TERMINATION DATE; AND FOR OTHER PURPOSES.

* * *

Appendix F

WHEREAS, an Application for Development Approval for the Downtown Uptown Development of Regional Impact, known as "Downtown Uptown," was originally submitted to the City of West Palm Beach and the Treasure Coast Regional Planning Council on March 21, 1988, and was supplemented with additional information submitted August 30, 1988, November 4, 1988 and January 4, 1989, in accordance with Section 389.96, Florida Statues; and

WHEREAS, the applicant, Downtown Uptown Venture, through its authorized agent, James R. Brindell, Esquire, proposes to construct 3.7 million square feet of office space, 190,000 square feet of retail, 800 hotel rooms, and 1,000 dwelling units, constituting a Development of Regional Impact on 76.90 acres of property legally described in Exhibit "A," attached hereto, and located in the City of West Palm Beach, Florida; and

WHEREAS, the DOWNTOWN UPTOWN JOINT VENTURE has filed with the CITY OF WEST PALM BEACH an Application for Development Approval of a Development of Regional Impact under the provisions of Section 380.06, Florida Statutes; and

WHEREAS, the public notice requirements of the City of West Palm Beach and Section 380.07(11), Florida Statutes, have been satisfied and notice has been given to the Florida Department of Community Affairs, Treasure Coast Regional Planning Council, Florida Department of Environmental Regulation, and the South Florida Water Management District; and

Appendix F

WHEREAS, the City and the Treasure Coast Regional Planning Council have considered the application, as submitted and as subsequently supplemented, and found it to be in compliance with applicable law; and

WHEREAS, the City Commission, on March 6, 1989, held a duly noticed public hearing on the Development of Regional Impact Application for Development Approval, and has heard and considered the testimony taken thereat and the reports, recommendations, exhibits, and other documentary evidence submitted at the public hearing; and

WHEREAS, the City Commission has received and considered the report and recommendations of the Treasure Coast Regional Planning Council; and

WHEREAS, the City Commission has made the findings of fact and conclusions of law hereinafter set forth with regard to the Application for Development Approval and has entered the following order; and

WHEREAS, the City, having considered all of the foregoing and being fully advised and informed in the premises, has determined that it is in the best interests of the citizens of West Palm Beach to approve a Development Order for the property which is the subject of the aforementioned Application for Development Approval, subject to specified conditions and limitations.

Now THEREFORE, BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF WEST PALM BEACH, FLORIDA, that:

Appendix F

SECTION 1: The City Commission hereby makes the following FINDINGS OF FACT:

1. The DOWNTOWN UPTOWN JOINT VENTURE (the "Developer") has filed with the CITY OF WEST PALM BEACH, FLORIDA (the "City") an Application for Development Approval for a Development of Regional Impact ("Downtown Uptown DRI Application for Development Approval") pursuant to provisions and requirements of Section 380.06, Florida Statutes.

2. Copies of the Downtown Uptown DRI application for development approval were sent to the TREASURE COAST REGIONAL PLANNING COUNCIL ("TCRPC") and the DEPARTMENT OF COMMUNITY AFFAIRS OF THE STATE OF FLORIDA ("DCA") pursuant to Section 380.06(10)(a), Florida Statutes, on July 17, 1987.

3. On April 19, 1988, September 27, 1988 and December 1, 1988, the TCRPC requested additional information in writing from the Developer and additional information was filed on August 30, 1988, November 4, 1988, and January 4, 1989.

4. The Downtown Uptown DRI application for development approval, as supplemented, seeks development approval for approximately 78 acres of real property (hereinafter "Downtown Uptown") which is legally described in Exhibit A, attached hereto and incorporated herein.

5. The City has given notice that a proposed development is undergoing development of regional impact review.

Appendix F

6. The City has given notice and held a public hearing to consider the Downtown Uptown DRI application for development approval in accordance with Section 380.06(11) and the Zoning Code of the City.

7. On February 13, 1989, TCRPC submitted its report and recommendation on the regional impact of the proposed DRI.

8. The proposed development is not in an Area of Critical State Concern, designated pursuant to the provisions of Section 380.06, Florida Statutes.

9. As long as the developer complies with the conditions of approval contained in this Development Order, the development of Downtown Uptown, in accordance with the Downtown Uptown DRI application for development approval, does not unreasonably interfere with the achievement of the objectives of the State Land Development Plan.

10. As long as the developer complies with the conditions of approval contained in this Development Order, the development of Downtown Uptown, in accordance with the Downtown Uptown DRI application for development approval is consistent with the City's comprehensive plan, as amended, and land development regulations proposed to be adopted simultaneously with this Development Order.

11. As long as the developer complies with the conditions of approval contained in this Development Order, the

development of Downtown Uptown, in accordance with the Downtown Uptown DRI application for development approval, is consistent with the report and recommendations of the Treasure Coast Regional Planning Council submitted pursuant to Section 380.07 (12). Florida Statutes, in that:

A. Negative impacts of environmental, natural and historical resources are expected to be minimal and these impacts will be mitigated by compliance with the conditions of approval.

B. The Downtown Uptown development will have a positive impact on the economy of the region.

C. There are adequate public facilities available or planned and funded to serve the development of Downtown Uptown in a safe and efficient manner, provided that such development is carried out in accordance with each and every condition and limitation of this Development Order.

D. Based on the transportation conditions of approval, Phase I of the Downtown Uptown development will efficiently use transportation facilities. Development beyond Phase I is contingent on the transportation and transportation-related impacts being addressed either through the substantial deviation process or as part of the City's Areawide Development of Regional Impact.

E. Based on the housing conditions of approval, the Downtown Uptown development will favorably

affect the ability of people to find adequate housing reasonably accessible to their places of employment.

F. The demand on energy resources has been reduced through the conditions of approval.

SECTION 2: The City Commission hereby makes the following CONCLUSIONS OF LAW:

After having considered the Downtown Uptown DRI application for development approval, the report and recommendations of the TCRPC, the recommendations of the CITY's own professional staff, the opinion, advice and counsel of the public, and based on the above Findings of Fact, the City Commission of the CITY hereby concludes that:

1. As long as the developer complies with the conditions of approval contained in this development order, the development of the Downtown Uptown DRI Application for Development Approval complies with the requirements of Section 380.06(12), Florida Statutes.

2. As long as the developer complies with the conditions of approval contained in this development order, the development of the Downtown Uptown DRI application for development approval complies with the requirements of Section 380.06(14) in that:

   A. The development proposed in the Downtown Uptown DRI application for development

approval will not unreasonably interfere with achievement of the objectives of the State Land Development Comprehensive plan;

B. The development proposed in the Downtown Uptown DRI application for development approval is consistent with the Comprehensive Plan of the City, as amended, and all applicable land development regulations as proposed to be adopted simultaneously with this Development Order; and

C. The development proposed in the Downtown uptown DRI application for development approval is consistent with the report and recommendations of the TCRPC.

3. This Development Order supersedes any and all other Development Orders issued by the City regarding Downtown Uptown pursuant to Section 380.06 or any other Authority.

4. The Downtown Uptown DRI application for development approval and this Development Order has been considered and approved in accordance with each and every applicable requirement of Section 380.06.

SECTION 3: IN ACCORDANCE WITH THE PROVISIONS OF SECTION 380-06, FLORIDA STATUTES (1987). THE CITY COMMISSION OF THE CITY OF WEST PALM BEACH DOES HEREBY GRANT

Appendix F

THIS DEVELOPMENT ORDER APPROVING THE DOWNTOWN UPTOWN DEVELOPMENT OF REGIONAL IMPACT, SUBJECT TO THE CONDITIONS, RESTRICTIONS AND LIMITATIONS HEREINAFTER SET FORTH.

* * *

SITE PLAN REVIEW

41. A. *Intent*

Since the master plan for the project does not contain actual building footprints, the City Planning Board and the City Commission shall retain the ability to review the specific site development proposals for each site. This review will ensure that the development of individual parcels is consistent with the conditions of approval contained in this development order and that the design characteristics of each component have no substantial, adverse effect on surrounding properties. This special process shall be referred to as Level 3 Site Plan Review.

B. *Process*

Site plans for each parcel or portion of a parcel contained within this project shall be submitted to the Administrator of Community Development and Planning prior to the issuance of any building permit. The site plan shall be submitted to the City Planning Board and the City Commission for its review and, unless postponed pending submission of additional information, shall be acted upon

by the City Planning Board within 45 days following the receipt of a completed application and shall be acted on by the City Commission within 60 days after the close of the public hearing conducted by the Planning Board. Failure of the City Commission to review a complete application within this period shall result in automatic approval. Minor changes to be approved site plans shall be approved by the Administrator of Community Development and Planning, or his/her designee. Minor changes are those changes that do not trigger Level I or Level II site plan review pursuant to Section 33.15(e)(5) and (6), West Palm Beach Zoning Code.

C. *Standards*

The Planning Board and City Commission review of individual site plans is limited to the site design qualitative development standards contained in Section 33-15 (c), West Palm Beach Zoning Code, and the conditions of approval contained in this development order. Additionally, the City Commission review shall include the review of any application for a Class A or Class B Special Use and any application for a waiver or reduction of additional standards for a special use or a use permitted with extra requirements submitted with the site plan application. During Level 3 Site Plan Review, the City Commission may exercise its authority to relax or waive zoning code requirements pursuant to Section 33-86, West Palm Beach Zoning Code.

* * *

Appendix F

SECTION 14: This Development Order shall be binding upon and inure to the benefit of the Developer and its assigns or successors in interest and the present owners and their assigns or successors in interest. It is understood that any reference herein to any governmental agency shall be construed to also include any future instrumentality which may be created and designated as successor in interest to, or which otherwise possesses any of the powers and duties or, any referenced governmental agency in existence on the effective date of this Development Order.

SECTION 15: In the event that any portion or section of this Development Order is determined to be invalid, illegal or unconstitutional by a court of competent jurisdiction, such decision shall in no manner affect the remaining portions or section of the Development Order which shall remain in full force and effect.

SECTION 16: This Development Order shall become effective immediately upon second reading.

FIRST READING THIS SIXTH DAY OF MARCH 1989.

SECOND AND FINAL READING THIS TWENTIETH DAY OF MARCH 1989.

Appendix F

(CORPORATE SEAL) CITY OF WEST PALM BEACH
BY ITS CITY COMMISSION

s/ [illegible]
ATTEST: MAYOR

s/ Agnes E. Hayhurst
City Clerk

APPROVED AS TO FORM

s/ Carl V.M. Coffin
City Attorney

March 22, 1989

I hereby certify this to be a true and correct copy of the City of West Palm Beach Ordinance No. 2268-89 as approved by the City Commission March 20, 1989 and consisting of 38 pages.

s/ Agnes E. Hayhurst
City Clerk

APPENDIX G — PETITION IN EMINENT DOMAIN DATED AND FILED JUNE 21, 1996

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY.

CASE NO. CL 96 5381 AI

WEST PALM BEACH COMMUNITY
REDEVELOPMENT AGENCY,

Petitioner,

vs.

ADVANTAGE WEST PALM BEACH, INC., EDWIN J. NELSON, KENNETH S. RAPPAPORT, TRUSTEE, NOVO TRUST, COUNTY OF PALM BEACH, HEARTWOOD 88', INC., DONALD F. MINTMIRE, TRUSTEE, UNITED STATES OF AMERICA, WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, DAVID L. MARSH, FIRST UNION NATIONAL BANK OF FLORIDA, BARTON-ASCHMAN ASSOCIATES, INC., STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION, SAASTOPANKKIEN KESKUS-OSAKE-PANKKI, WPB GATEWAY DEVELOPMENT COMPANY, RUSSELL BELLE, CITY OF WEST PALM BEACH, S & S INVESTMENTS, (FOR CAMOLEE W. SMELCER), REGINA A. GILLESPIE, BANKATLANTIC, FIRST BANK OF INDIANTOWN, JENNIEVE L. LeBLANC, MORTON F., PHILLIPS, JOYCE PHILLIPS, HELEN M. COBB, OLIVER B. COBB, ARCHY ESAKOVICH, MICHAEL CANTOR, TOLEDANO ITF

Appendix G

RESEARCH TO PREVENT BLINDNESS, P.T.C. FINANCE LIMITED, VERA KAMINESTER, LEWIS KAMINESTER, FRANCIS R. MARADIE, EFFYE E. MARADIE, STELLY-HOVEN, INC., JAMES WATTS, TRUSTEE, MILDRED W. OLSON, RICHARD F. OLSON, ARTHUR WESTCOTT, JOYCE HATCHER, WALTER HATCHER, PAMELA J. ROLFS, FIDELITY FEDERAL SAVINGS BANK OF FLORIDA, RICHARD E. FRIEND, TRUSTEE, A.I.S. PROPERTIES, THE WILLIAM H. CARTWRIGHT FAMILY LIMITED PARTNERSHIP, WILLIAM H. CARTWRIGHT, BERT MOERINGS, MARSHA MOERINGS, JULIA SILVA BALBONI, BANK UNITED FSB, CAROL ANDRUS, MWO VENTURES, INC. and INTERCONTINENTAL BANK, T C ACQUISITION, INC., CHRISTOPHER H. COOK, TRUSTEE, GRACE RIDER, GAYANNE BOOTH, GARRY E. WOOD, ROBERT DOUGLASS, FELIPE PADILLA deALBA, COMMUNITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF THE PALM BEACHES, RUTH DIPIERTRO, STUART LEDIS, BANKERS TRUST COMPANY OF CALIFORNIA, N.A., COUNTY COLLECTION SERVICES, INC., GEORGE A. GRENIER, RAYMOND A. BILLIEL, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF THE PALM BEACHES, EMILY M. MOTES, a/k/a EMILY M. HOUSE, WILLIAM KIRSHNER, RUTH D. KIRSHNER, CECEIL TISHMAN, SUNANDA UKHALKAR, SANJEEV UKHALKAR, DAVID BOTTOMS, JR., FEDERAL NATIONAL MORTGAGE ASSOCIATION, HOME FEDERAL SAVINGS & LOAN ASSOCIATION OF PALM BEACH, DAN, INC., LENNAR FLORIDA LAND I.Q.A., LTD., LENNAR FLORIDA PARTNERS I, L.P., U.S. TRUST CO. OF FLORIDA, BANKUNITED FSB,

Appendix G

MAINLINE ENTERPRISES, INC., CHARLES S. ROWAN, JOHN C. CASSIDY, GLOBESPAN TRAVEL INTERNATIONAL, INC., BGS LEASING GROUP, LTD., O.R.E.O., INC., DOUGLAS G. HOWELL, JERRY G. GUFFY, TRUSTEE, PETER GLUCK, ARDEMI, INC., RENE CERISOLES, JUPITER PROPERTIES, INC., GERALD J. SARTORI, ILENE KLASFELD, JON KLASFELD, SERGE HARVEY, JOSEPH M. FALLON, MIRIAM JOANN FELIX, C & H NATIONWIDE, INC., RENE DIBUT, KATHY DIBUT, GEORGE KALEITA, ROSE ANNE KALEITA, ROBERT LEWIS, HELEN LEWIS, JAMES R. KEOGH, DINER'S CLUB, INC., UNITED STATES OF AMERICA, ADMINISTRATOR OF VETERANS AFFAIRS, SCOTT A. JOHNSON, P.A., DAYTON KORT, SUSANNA KORT, ALLAN H. SMITH, JUDITH L. SMITH, AMERICAN EXPRESS COMPANY, KELLY TRACTOR COMPANY, DIXIE CHIROPRACTIC, POLO JEWELERS, ESTATE OF LAKE CLARKE SHORES HOMEOWNERS' ASSOCIATION, STATE OF FLORIDA TAX WARRANT, BEVERLY AND FREEMAN, JONATHAN D. COMMANDER, MUKESH D. BHATT, and JOHN K. CLARK, TAX COLLECTOR,

Respondents.

PETITION IN EMINENT DOMAIN

Petitioner, WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, sues each Respondent set forth in Exhibit "A", attached, and alleges:

Appendix G

1. This is an action in eminent domain to condemn certain property lying, being, located and situated in Palm Beach County, Florida.

2. Petitioner is a community redevelopment agency created pursuant to §163.330, et seq., *Fla. Stat.*

3. Petitioner is exercising its power of eminent domain by virtue of the authority given to it by §163.370 and §163.375, *Fla. Stat.*, and by Chapters 73 and 74, *Fla. Stat.* Said property hereinafter described is necessary for the public purpose of proceeding with the Downtown/Uptown Redevelopment project as described in Petitioner's Redevelopment Plan in order to revitalize and implement the Downtown/Uptown Development of Regional Impact by assembling the remaining parcels within its boundaries and making the same available for redevelopment as a mixed use redevelopment project.

4. A description identifying the property sought to be acquired is attached as Exhibit "A", including any and all rights of development appertaining to said property pursuant to City of West Palm Beach Ordinance No. 2268-89, as amended.

5. The estate or interest sought to be condemned by these proceedings is fee simple absolute title.

6. The ages of each and all natural Respondents named in these proceedings are unknown to the Petitioner.

Appendix G

7. The Petitioner has made a diligent search and inquiry to discover the names, residences, legal disabilities, if any, and the interest in the property of all owners, lessees, mortgagees, junior creditors, lienholders, persons in possession and all persons having or claiming to have any interest in said property, and the same is particularly set forth in Exhibit "A" attached; and to all of the Respondents listed in Exhibit "A" attached if said Respondents are living, if any, and if said Respondents are deceased, the unknown spouse, heirs, devisees, grantees, creditors, lienors, or other parties claiming by, through, under or against any such deceased Respondents, if alive, and if dead, their unknown spouse, heirs, devisees, grantees, creditors, lienors or other parties claiming by, through, under or against any such deceased Respondents; and all parties having or claiming to have any right, title or interest in the property described in these proceedings who are unknown to the Petitioner.

8. Petitioner has surveyed and located its line or area of construction and intends in good faith to construct on or over the described property.

9. The Board of Commissioners of the WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY has by Resolution No. 96-7 determined that the acquisition of the property described in attached Exhibit "A" is necessary for the redevelopment project. A copy of Resolution No. 96-7 is attached as Exhibit "B".

10. The City Commission of the City of West Palm Beach has by Resolution No. 151-96 authorized the acquisition of the property described in attached Exhibit "A"

by Petitioner. A copy of City of West Palm Beach Resolution No. 151-96 is attached as Exhibit "C".

11. There are no mobile homes located on the property sought to be acquired.

12. Petitioner has complied with all conditions precedent necessary for the filing of this action.

13. Petitioner reserves the right to set off or claim damages for any and all environmental damages and/or waste associated with any contaminants, including, but not limited to, petroleum products, hazardous waste and medical waste determined to be present on or released into the property sought to be acquired while Respondents were in possession.

WHEREFORE, Petitioner demands that:

A. The property described in this Petition be condemned and taken by Petitioner for the uses and purposes set forth in this Petition and that the interest sought by this Petitioner in said property as set forth in the Petition be vested in the Petitioner.

B. Trial by jury be held on all matters triable as a matter of right by a jury.

C. The jury be required to view the property.

Appendix G

s/ James W. Vance
James W. Vance
VANCE & DONEY, P.A.
Attorneys for Petitioner
1615 Forum Place, Suite 200
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–and–

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& McLean
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Florida Bar #199613
Co-Counsel

APPENDIX H — MOTION IN LIMINE DATED MARCH 26, 1997

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY.

CASE NO. CL 96-5381 AI

WEST PALM BEACH COMMUNITY
REDEVELOPMENT AGENCY,

Petitioner,

vs.

ADVANTAGE WEST PALM BEACH, INC., et al.,

Respondents.

MOTION IN LIMINE

Petitioner, WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, in accordance with §73.061, *Fla. Stat.*, hereby requests that the Court schedule a hearing in limine prior to the valuation trial in this cause and as grounds therefor would show as follows:

1. This is an eminent domain proceeding in which Petitioner is seeking to acquire all, or nearly all, of the lands located within the Downtown Uptown Development of Regional Impact. (Hereinafter "Downtown Uptown DRI").

Appendix H

2. The Downtown Uptown DRI was approved and established by City of West Palm Beach Ordinance No. 2268-89, as subsequently amended by Ordinance No. 2287-89 and Ordinance No. 2313-89. These ordinances collectively comprise the Development Order for the Downtown Uptown DRI. (Hereafter "Development Order"). At the time the Development Order was approved by the City of West Palm Beach, all lands within the boundaries of the DRI were owned or controlled by the applicant/developer, Downtown Uptown Venture, by virtue of one or more land trusts.

3. Subject to certain specified conditions and contingencies, the Development Order approved the construction of a certain level of development within the boundaries of the Downtown Uptown DRI. The DRI Development Order does not specifically detail the type or intensity of development that would ultimately occur or be permitted on any particular parcel of land within the DRI.

4. Since the approval of the Development Order in 1989, numerous mortgage foreclosure sales and tax sales have resulted in the transfer of record title to nearly all lands within the DRI to third parties (other than the Downtown Uptown Venture).

5. Commencing in 1989 and continuing thereafter, the Downtown Uptown Venture executed numerous documents entitled "Collateral Assignment of Development Rights," and therein (through its land trustee) pledged as additional security for certain mortgage loans so-called development rights which were purportedly created by the DRI Development Order. Only some of these Collateral Assignments of Development

Rights were recorded in the public records of Palm Beach County, Florida.

6. The Downtown Uptown Venture subsequently defaulted on a substantial number of the mortgage loans that had been secured by the pledge of certain so-called development rights. Upon judicial sale of some, but not all, of the above-referenced properties, the purchaser purportedly acquired a certain amount of so-called development rights by Certificate of Title. Alternately, some mortgages that had been secured by the pledge of so-called development rights have also been foreclosed upon and no mention of so-called development rights was made in the applicable Certificate of Title following the judicial sale.

7. Moreover, commencing in 1992, the Downtown Uptown Venture (through its land trustee), executed several documents entitled "Absolute Assignment of Development Rights" which purportedly transferred or conveyed all, or nearly all, of the so-called development rights associated with the Downtown Uptown DRI to third parties. As set forth in its Answer filed herein, Defendant, ADVANTAGE WEST PALM BEACH, INC., now claims ownership of substantially all of these so-called development rights and seeks compensation therefore.

8. Numerous issues exist in this cause as to the validity and effect, if any, of the above-referenced purported assignments of development rights. These issues directly and significantly impact the valuation of all lands involved in this eminent domain proceeding. Moreover, prior to the disbursement of any proceeds from the Court Registry and

prior to the valuation trial in this cause, it is necessary for this Court to determine, as a matter of law under all of the facts and circumstances of this cause, the following:

A. Whether the so-called development rights could have been severed from the under-lying real estate within the DRI;

B. Whether developments rights are a species of property which may exist independent of any real property when all of the real property has been transferred to others;

C. Whether the purported assignments of development rights were and continue to be valid; and

D. Whether the parties must value the so-called development rights as severed from the realty and compensate Defendant, ADVANTAGE WEST PALM BEACH, therefore.

9. The Court should hold a hearing, in limine, to settle all disputed issues as to the so-called assignments of development rights prior to trial. A ruling on such issues will greatly simplify valuation issues and apportionment proceedings on all parcels in this cause.

WHEREFORE, Petitioner requests that the Court schedule a hearing, in limine, to settle all disputed matters pertaining to the issue of "development rights" as set forth above.

Appendix H

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to all those listed on the attached mailing this 26th day of March, 1997.

s/ William P. Doney
William P. Doney
VANCE & DONEY, P.A.
Attorneys for Petitioner
1615 Forum Place, Suite 200
West Palm Beach, FL 33401
(561) 684-5544
Florida Bar #083228

–and–

Arnold M. Weiner, Esquire
LAW OFFICES OF ARNOLD M. WEINER
SunTrust Building, Suite 325
1111 Lincoln Road
Miami Beach, FL 33139
(305) 531-9200
Florida Bar #312479

APPENDIX I — COLLATERAL ASSIGNMENT OF DEVELOPMENT RIGHTS DATED FEBRUARY 16, 1990

COLLATERAL ASSIGNMENT OF DEVELOPMENT RIGHTS

THIS COLLATERAL ASSIGNMENT OF DEVELOPMENT RIGHTS, made this 16th day of February, 1990, by and between Mario G. de Mendoza, III, as Trustee, and Downtown/Uptown Venture, hereinafter collectively referred to as "Assignor", and BERT MOERINGS and MARSHA MOERINGS, his wife, as "Assignee"

WITNESSETH:

WHEREAS, Assignor is indebted to the Assignee in the amount of ONE MILLION TWO HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS ($1,250,000.00), which indebtedness is represented by a Promissory Note and Mortgage dated February 15, 1990, which Mortgage encumbers property described as follows:

> Lot Four (4), and the North 1/2 of Lot Five (5), BLOCK 69, HIGHLAND PARK ADDITION TO WEST PALM BEACH, according to the Plat thereof on file in the Office of the Clerk of the Circuit Court in and for Palm Beach County, Florida, recorded in Plat Book 1, Page 122, Public Records of Palm Beach County, Florida.
>
> AND
>
> Lots One (1) through Ten (10), Block SEVEN (7), AMENDED PLAT OF PALM BEACH HEIGHTS,

Appendix I

Addition to West Palm Beach, Florida according to the Plat thereof on file in the Office of the Clerk of the Circuit Court in and for Palm Beach County, Florida, recorded in Plat Book 2, Paged 74, Public Records of Palm Beach County, Florida.

WHEREAS, the City of West Palm Beach, Florida has adopted it's Ordinance No. 2268-89 and 2313-89 (hereinafter referred to as the "Ordinance"), granting Assignor certain development rights with respect to the development known as Downtown/Uptown, within which development the subject property is located; and

WHEREAS, the parties desire that a portion of the development rights held by Assignor be assigned and pledged as security for the aforementioned indebtedness;

NOW, THEREFORE, in consideration of the premises, and for value received at or before the ensealing and delivery of these presents, the Assignor does hereby conditionally transfer, sell, set over, convey and assign unto Assignee the right to utilize 125,000 square feet of the office or retail development approved for the subject real property by and subject to all of the terms and conditions set forth in City of West Palm Beach Ordinance No. 2268-89 and 2313-89, as and for security for the repayment of Assignor's indebtedness to Assignee.

TO HAVE AND TO HOLD the same from the date hereof during the term of said Promissory Note and any extension or renewal thereof, subject to the following conditions:

Appendix I

1. In the event of any default on the part of the Assignor under the Note and Mortgage in favor of Assignee which is not cured within ten (10) days, Assignee may declare the remaining balance of the note to be due and payable, and at the sole option of Assignee, this Assignment shall effectuate and Assignee shall have all rights available to a secured creditor under the provisions of Chapter 679, Florida Statutes.

2. Assignee shall not be under any obligation at any time to perform any of the obligations and duties of the Assignor under the Ordinance. However, upon the exercise of the Assignee's rights under this Collateral Assignment of Development Rights, the Assignee and any other purchaser of Assignor's rights shall be bound by all of the terms, conditions and provisions of the Ordinance.

THIS COLLATERAL ASSIGNMENT OF DEVELOPMENT RIGHTS shall remain in full force and effect until payment in full of the Assignor's obligation to Assignee, including any extension or renewal thereof, at which time all obligations hereunder shall terminate.

IN WITNESS WHEREOF, the parties have caused these presents to be executed on the day and year first above written, by their undersigned officers thereunto duly authorized.

Appendix 1

Signed, sealed and delivered
in the presence of:

s/ Audrey Blair
Witness

s/ [illegible]
Witness

s/ Mario G. de Mendoza, III
Mario G. de Mendoza, III
as Trustee

DOWNTOWN/UPTOWN
VENTURE
a Florida General Partnership

s/ [illegible]
Witness

s/ [illegible]
Witness

By: s/ David C. Paladino II
David C. Paladino II,
Partner

Appendix I

STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I HEREBY CERTIFY that on this day before me, an officer duly qualified to take acknowledgments, personally appeared MARIO G. de MENDOZA, III, as Trustee, to me known to be the person described in and who executed the foregoing instrument and acknowledged before me that he executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this 16th day of February, 1990.

s/ Audrey Blair
Notary Public

My commission expires:
3/28/92

APPENDIX J — EXCERPTS FROM AGREEMENT FOR THE PURCHASE AND SALE OF REAL PROPERTY DATED JUNE 28, 1991

AGREEMENT FOR THE PURCHASE AND SALE OF REAL PROPERTY

Between

DONALD F. MINTMIRE, as Trustee and not individually, as "Seller"

and

CITY OF WEST PALM BEACH, a municipal corporation of the State of Florida, as "Buyer"

for

a vacant parcel of land

in

Palm Beach County, Florida

Attorneys for Buyer:

Carl V. M. Coffin, Esq.
City of West Palm Beach
200 2nd Street
West Palm Beach, FL 33401
Telephone: (407) 659-8017
Fax: (407) 659-8039

Attorneys for Seller:

Marvin S. Rosen, Esq.
Honigman Miller Schwartz and Cohn
222 Lakeview Avenue,
Suite 800
West Palm Beach, FL 33401
Telephone: (407) 838-4500
Fax: (407) 832-3036

Appendix J

AGREEMENT FOR THE PURCHASE AND SALE OF REAL PROPERTY

THIS AGREEMENT FOR THE PURCHASE AND SALE OF REAL PROPERTY ("**Agreement**") is made this 28th day of June, 1991, by and between Donald F. Mintmire, as Trustee and not individually, under Trust Agreement dated April 27, 1987, as amended, whose address is c/o Alagia, Day & Marshall, 265 Sunrise Avenue, Palm Beach, Florida 33480, (hereinafter referred to as "Seller"), and The City of West Palm Beach, a municipal corporation of the State of Florida, whose address is 200 2nd Street, West Palm Beach, Florida 33401 (hereinafter referred to as "**Buyer**").

RECITALS:

A. Seller is the owner of certain real property located in Palm Beach County, Florida, more particularly described in *Exhibit "A"* attached hereto (hereinafter referred to as the "**Property**").

B. Seller desires to sell the Property to Buyer, and Buyer desires to purchase the Property from Seller, pursuant to the terms and conditions of this Agreement.

NOW, THEREFORE, for and in consideration of the sum of TEN AND NO/100 ($10.00) DOLLARS and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Seller, it is hereby agreed as follows:

Appendix J

ARTICLE I

SALE – PURCHASE

Section 1.01 ***Property.*** Seller agrees to sell and Buyer agrees to purchase the Property, including all rights-of-way, privileges and easements appurtenant to the Property.

Section 1.02 ***Project.*** Buyer intends to purchase the Property for purposes of constructing a roadway in accordance with the proposal commonly known as "Plan A" contained within the governing Development Order, Ordinance No. 2268-89, as amended by Ordinance No. 2287-89 and by Ordinance No. 2313-89 (the "Development Order").

Section 1.03 ***Time for Acceptance and Effective Date.*** If this Agreement is not executed by both Buyer and Seller and delivered to Buyer by 5:00 P.M. on June 28, 1991, this Agreement shall thereafter be null and void. The "Effective Date" of this Agreement shall be the date on which the last one of the Seller or Buyer has executed this Agreement. The "Closing" shall be the event which transpires on the "Closing Date" (as defined in Section 6.01 of this Agreement). The "Breaking of Escrow" (as defined in Section 6.02 hereof) shall be the time at which all terms of this Agreement are considered fully performed, unless specifically provided to survive the Closing hereof. The use of the terms "Closing" and "Closing Date" when used in this Agreement can be used interchangeably.

Section 1.04 ***Compliance With Florida Statutes §166.045.*** The parties recognize that the requirements of Florida Statutes §166.045 apply to this transaction.

Appendix J

ARTICLE II

PURCHASE PRICE AND TERMS OF PAYMENT

Section 2.01 ***Purchase Price.*** The purchase price for the Property is TWO MILLION FIVE HUNDRED THOUSAND AND NO/100 ($2.500,000.00) DOLLARS (hereinafter called the "Purchase Price") payable in accordance with the following Section 2.02 hereof.

* * *

IN WITNESS WHEREOF, each of the parties hereto have duly executed this agreement as of the date indicated below.

WITNESSES:	SELLER:
s/ Lynda L. Brodsky	s/ Donald F. Mintmire, Trustee
s/ [illegible]	Donald F. Mintmire, as Trustee (and not individually) under Land Trust Agreement dated April 27, 1987, as amended

Dated: June 27, 1991

Appendix J

BUYER:

CITY OF WEST PALM BEACH, a municipal corporation of the State of Florida

Attest:

s/ Agnes E. Hayhurst
Agnes Hayhurst,
City Clerk

By: s/ David L. Smith
David L. Smith, Vice Mayor

Dated: June 28, 1991

APPENDIX K — ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS DATED DECEMBER 30, 1992

ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS

THIS ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS, made this 30th day of December, 1992, by and between DONALD F. MINTMIRE, as TRUSTEE, and DOWNTOWN/UPTOWN VENTURE, hereinafter collectively referred to as "ASSIGNOR", and BERT MOERINGS and MARSHA MOERINGS, his wife, hereinafter collectively referred to as "ASSIGNEE".

WITNESSETH:

WHEREAS, ASSIGNOR is indebted to ASSIGNEE and ASSIGNEE has agreed to forbear from moving for or otherwise seeking a deficiency judgment against ASSIGNOR until after December 31, 1993; and

WHEREAS, ASSIGNOR has conveyed to ASSIGNEE, and ASSIGNEE owns or holds an interest in and to the property described as follows:

> Lots 1 through 10, Block 7, Palm Beach Heights Addition, Plat Book 2, page 74. Palm Beach County Public Records.

WHEREAS, the City of West Palm Beach, Florida has adopted its Ordinance No: 2268-89 and 2313-89 (hereinafter referred to as the "ORDINANCE"), granting ASSIGNOR certain development rights with respect to the development known as DOWNTOWN/UPTOWN, within which development the subject property is located; and

Appendix K

WHEREAS, the parties desire that a portion of the development rights held by ASSIGNOR be assigned and transferred as consideration for the forbearance of ASSIGNEE;

NOW, THEREFORE, in consideration of the premises, and in consideration of the forbearance of ASSIGNEE as outlined herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the ASSIGNOR does hereby unconditionally transfer, sell, set over, convey and assign unto ASSIGNEE the right to utilize 370,000 square feet of the office or retail development approved for the subject real property by and subject to all of the terms and conditions set forth in City of West Palm Beach Ordinance No: 2268-89 and 2313-89, as and for consideration as set forth herein.

TO HAVE AND TO HOLD the same from the date hereof subject to the condition that ASSIGNEE shall not be under any obligation at any time to perform any of the obligations and duties of the ASSIGNOR under the ORDINANCE; however, upon the exercise of the ASSIGNEE'S rights under this Absolute Assignment of Development Rights, the ASSIGNEE and any other purchaser of ASSIGNOR'S rights shall be bound by all of the terms, conditions and provisions of the ORDINANCE.

IN WITNESS WHEREOF, the parties have caused these presents to be executed on the day and year first above written, by their undersigned officers thereunto duly authorized.

Appendix K

Signed, sealed and delivered
in the presence of:

s/ Dawn S. Salamone
Witness Dawn S. Salamone

s/ Lynda L. Brodsky
Witness Lynda L. Brodsky

s/ Donald F. Mintmire
DONALD F. MINTMIRE,
as TRUSTEE

DOWNTOWN/UPTOWN
VENTURE
a Florida General Partnership

s/ [illegible]
Witness

s/ Victoria Paladino
Witness

By: s/ David C. Paladino, II
DAVID C. PALADINO, II
PARTNER

Appendix K

STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I HEREBY CERTIFY that on this day before me, an officer duly qualified to take acknowledgments, personally appeared DONALD F. MINTMIRE, as Trustee, to me known to be the person described in and who executed the foregoing instrument and acknowledged before me that he executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this 30th day of December, 1992.

s/ Lynda L. Brodsky
Notary Public

My Commission Expires: 6/24/94

[stamp]
LYNDA L. BRODSKY
MY COMMISSION # CC 813987
EXPIRES: June 24, 1994

APPENDIX L — ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS DATED APRIL 15, 1994

ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS

THIS ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS, made this 15 day of April, 1994, by and between PAMELA J. ROLFS, hereinafter referred to as "ASSIGNOR", and BERT MOERINGS and MARSHA MOERINGS, his wife, hereinafter referred to as "ASSIGNEE".

WITNESSETH:

WHEREAS, ASSIGNOR desires to transfer to ASSIGNEE and ASSIGNEE seeks assignment of certain development rights previously transferred to ASSIGNOR by Downtown/Uptown Venture and Donald F. Mintmire, as Trustee, by Absolute Assignment of Development Rights dated December 30, 1992, a copy attached hereto; and

WHEREAS, ASSIGNEE owns or holds a legal or equitable interest in and to property that will benefit from said assignment; and

WHEREAS, the City of West Palm Beach, Florida has adopted its Ordinance No: 2268-89 and 2313-89 (hereinafter referred to as the "ORDINANCE"), granting ASSIGNOR certain development rights with respect to the development known as DOWNTOWN/UPTOWN, within which development the subject property is located; and

Appendix L

WHEREAS, the parties desire that a portion of the development rights held by ASSIGNOR be assigned and transferred;

NOW, THEREFORE, in consideration of the premises, including the sum of $10.00 cash in hand paid and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the ASSIGNOR does hereby unconditionally transfer, sell, set over, convey and assign unto ASSIGNEE the right to utilize 55,000 square feet of the office, 96,255 retail development, 400 hotel rooms, 425 residential rooms, by and subject to all of the terms and conditions set forth in City of West Palm Beach Ordinance No: 2268-89 and 2313-89, as and for consideration as set forth herein.

TO HAVE AND TO HOLD the same from the date hereof subject to the condition that ASSIGNEE shall not be under any obligation at any time to perform any of the obligations and duties of the ASSIGNOR (or his predecessor in interest) under the ORDINANCE; however, upon the exercise of the ASSIGNEE'S rights under this Absolute Assignment of Development Rights, the ASSIGNEE and any other purchaser of ASSIGNOR'S rights shall be bound by all of the terms, conditions and provisions of the ORDINANCE.

IN WITNESS WHEREOF, the parties have caused these presents to be executed on the day and year first above written, by their undersigned officers thereunto duly authorized.

Appendix L

Signed, sealed and delivered
in the presence of:

s/ Donald F. Mintmire
Witness Donald F. Mintmire

s/ Pamela J. Rolfs
PAMELA J. ROLFS

s/ Henry J. Rolfs, Jr.
Witness HENRY J. ROLFS, JR.

STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I HEREBY CERTIFY that on this day before me, an officer duly qualified to take acknowledgments, personally appeared PAMELA J. ROLFS, to me known to be the person described in and who executed the foregoing instrument and acknowledged before me that she executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this 15 day of April, 1994.

s/ Paul A. Gafran
Notary Public

My Commission Expires:

[stamp]
OFFICIAL NOTARY SEAL
PAUL GAFRAN
COMMISSION NUMBER
CC267765
MY COMMISSION EXP.
APR. 5, 1997

APPENDIX M — SETTLEMENT AGREEMENTS DATED NOVEMBER 1994 AND NOVEMBER 18, 1994

TERMS OF SETTLEMENT

Advantage West Palm Beach, Inc. ("AWPB") and all the persons listed below, in their capacities as beneficiaries under that Trust dated April 27, 1987 (the "April 27, 1987 Trust") (as amended and under which Donald F. Mintmire serves as Trustee) and in every other capacity whatsoever, whether individual, corporate, representative or otherwise (collectively, the "Signers"), hereby agree as follows:

1. AWPB agrees to pay Signers $600,000.00 at closing.

2. AWPB agrees to hold first-phase development rights as a separate asset from all real property holdings and further agrees to value the development rights at no less than Eight Hundred Forty-Five Thousand Dollars and No/100 ($845,000.00). $750,000.00 of the proceeds of the sale of development rights shall go to the Signers.

3. The Signers agree to convey by quit-claim deed or by other appropriate method as determined by AWPB, all lands and legal and equitable rights and interests owned or controlled within the Downtown/Uptown DRI to AWPB.

4. The Signers represent that they comprise all the beneficiaries of the April 27, 1987 Trust. The Signer will instruct the Trustee to execute all documents necessary to effectuate this settlement.

Appendix M

Executed this __ day of November 1994.

ADVANTAGE WEST PALM BEACH, INC.

By: s/ Bert J. Moerings
Bert Moerings, President

SIGNERS

s/ Zoe D. Rolfs
Mrs. Zoe D. Rolfs

s/ Henry J. Rolfs
Henry J. Rolfs

s/ David C. Paladino
David C. Paladino

Appendix M

TERMS OF SETTLEMENT WITH CITY OF WEST PALM BEACH

The undersigned hereby agree to the settlement of the pending eminent domain proceeding styled *City of West Palm Beach v. Donald F. Mintmire, Trustee,* involving the Okeechobee Boulevard right-of-way within the Downtown/ Uptown development of regional impact upon the following terms and conditions:

1. In consideration for the full and complete settlement of the above styled eminent domain proceedings, including the pending appeal to the Fourth District Court of Appeal in Case No. 93-1352, and further including all costs and attorney's fees therein, both at trial and on appeal, City agrees to release the undersigned trustee and beneficiaries of the Mintmire trust from any and all claims including reimbursement or payment for the following expenses incurred by City in conjunction with the acquisition and construction of the Okeechobee Boulevard right-of-way:

A) Relocation of AT&T Cable	$125,000.00
B) Expenses incurred pertaining to detour	$100,000.00
C) Purchase of Barton-Aschmann 30% construction plans	$460,000.00
Total	$685,000.00

Appendix M

The undersigned trustee and beneficiaries of the Mintmire trust agree to dismiss the pending appeal with the Fourth District Court of Appeal with prejudice and deliver general releases in favor of the City of West Palm Beach, its officers, agents, attorneys, employees and other officials as to any and all claims of those with a legal or beneficial interest in the Downtown/Uptown development of regional impact, the eminent domain proceedings or other claims against the City.

2. The above release by City is intended to apply solely to the benefit of the undersigned trustee and beneficiaries of the Mintmire trust and is not intended to and shall not be construed to release the developer of the Downtown/Uptown DRI, or its successors or assigns, from any duties or obligations imposed by the development order, as amended.

3. The undersigned trustee and beneficiaries of the Mintmire trust hereby reaffirm the assignment of the "Mintmire Agreement" as shown in that document dated April 15, 1994 and recorded in Official Record Book 8221, page 209 of the Public Records of Palm Beach County. Said agreement has subsequently been assigned to Advantage West Palm Beach, Inc. City shall pay the sum of $600,000.00 to Advantage West Palm Beach, Inc. upon dismissal of the pending eminent domain appeal, and thereafter, City,

upon receipt of the subject property from the State of Florida Department of Transportation, will convey by Quit Claim Deed the excess Okeechobee Boulevard right-of-way to Advantage West Palm Beach, Inc. Upon doing so, the "Mintmire Agreement" shall be deemed fully executed and shall be terminated and each party shall release the other from the terms thereof. Advantage West Palm Beach, Inc. shall indemnify, defend and hold the City harmless from any and all claims from third parties as a result of the City's conveyance of the excess Okeechobee Boulevard right-of-way to Advantage West Palm Beach, Inc.

4. City shall use its best efforts to support the waiver of road impact fees for the Downtown/Uptown DRI. City shall also acknowledge the vesting of the Phase I development rights under the DRI and will use its best efforts to reactivate the community development district.

5. The undersigned trustee and beneficiaries of the Mintmire trust agree to instruct their attorney in the eminent domain appeal proceeding to execute a joint motion requesting that the appellate court defer ruling on the appeal for a period of thirty (30) days to permit finalization of settlement of this matter.

6. City shall erect a statue in honor of Henry Rolfs, Sr. within the Downtown/Uptown project Okeechobee Boulevard median.

Appendix M

7. The undersigned trustee and beneficiaries of the Mintmire trust represent that they compromise all beneficiaries of that trust agreement dated April 27, 1987, as amended, under which Donald F. Mintmire serves as trustee. The undersigned beneficiaries of the Mintmire trust will instruct the trustee to execute all documents necessary to effectuate the terms of this settlement.

8. The parties hereto understand and acknowledge that this Agreement constitutes an offer to settle or comprise disputed claims and that this document, as well as any relevant conduct or statements made in negotiations concerning this document, shall be inadmissible in any future legal proceedings in accordance with Section 90.408, *Fla. Stat.*

Executed this 18 day of November, 1994.

Advantage West Palm Beach, Inc.

By s/ Bert J. Moerings

Beneficiaries of the Mintmire Trust

s/ Zoe D. Rolfs
Mrs. Zoe D. Rolfs

s/ Henry J. Rolfs, Jr.
Henry J. Rolfs, Jr.

Appendix M

s/ David C. Paladino
David C. Paladino

s/ Donald F. Mintmire, Trustee
Donald F. Mintmire, Trustee

The above terms are acceptable
in concept subject to approval
the City Commission

s/ Nancy Graham
Mayor

APPENDIX N — LETTERS OF ADVANTAGE WEST PALM BEACH, INC. AND FIRST UNION NATIONAL BANK OF FLORIDA DATED DECEMBER 15, 1994

ADVANTAGE WEST PALM BEACH, INC.

Bert Moerings
President

1001 Alternate A1A
Jupiter, FL 33477
(407) 747-1659
FAX (407) 746-1055

December 15, 1994

Nancy I. O'Brien
Senior Vice-President
FIRST UNION NATIONAL BANK OF FLORIDA
4299 NE 36th Street
Miami Springs, FL 33166

Dear Ms. O'Brien:

The purpose of our December 2nd, 1994 meeting was not to settle your judgment. It was to facilitate a settlement while not being a party to it. Our offer was made to enhance the value of your property from our Development Rights. Our additional offers to have an option on your property through March, 1995 at $650,000, and later at $750,000, seem to be fruitless. You may, of course, reject them as you see fit.

I did indicate to Jim Vance that I would be willing to consider providing First Union with 50,000 sq.ft. of development rights not tied to an option on the property. I remain willing to do that with the only condition being that I am able to close the settlement agreement with the city.

Appendix N

I obviously do not agree with the conclusions of your consultant Mr. Kilday, and believe that the city will bear me out on this. Their formal response should be forthcoming.

Mr. Kushner was correct, that I am unwilling to offer consideration beyond that which is outlined herein. Please keep in mind that I have effectively increased my offer twice without receiving any constructive suggestions from the bank.

My goal is to bring benefit to us all by moving the project forward, rather than relying on the scant possibility of receiving a cash judgment from the courts three to five years from now. At present, my position is the same as yours. I am not the debtor to First Union Bank. Moving the project forward offers a far greater opportunity to recapture the bulk of our investments. We would like to be viewed as part of the solution and not part of the problem.

I am open to any constructive discussion and look forward to meeting with you in the next day or two.

Sincerely,

s/ Bert J. Moerings
Bert Moerings
President

Appendix N

4299 Northwest 36th Street
Miami Springs, Florida 33166
305 883 4402

December 15, 1994

VIA TELECOPIER AND REGULAR MAIL

Mr. Bert Moerings
c/o Mr. Hank Gonzalez
Gonzalez & Associates
1001 Alternate A1A
Jupiter, FL 33477

Re: *Downtown/Uptown Development*

Dear Mr. Moerings:

This letter is in response to certain telephone conversations that occurred yesterday between First Union's counsel, Manny Kushner, and you and your representative, Hank Gonzalez. More particularly, Mr. Kushner advises us that you are uncomfortable attending a meeting without my attendance or the attendance of some other "decision maker" from the Bank; that you are not willing to provide any additional consideration over and above what you have already offered to First Union; and that you believe upon assignment of your development rights to the Bank, or its successors, the Bank will become entitled to immediately obtain building permits and commence construction. This letter responds to each of these items.

Appendix N

I had not planned on attending the meeting proposed for this afternoon, because I did not think my attendance was necessary. Irene Marshall and Raul Martinez are familiar with the issues and have the necessary authority to resolve this matter. If you would like me to attend a meeting with you and your counsel, however, I will be happy to attend at a mutually agreeable place and time. First Union is anxious to amicably and reasonably resolve this matter, and I offer my personal involvement, if you believe it would help to achieve that goal.

Although I understand you are unwilling to offer anything more than you have already offered to First Union, I am unsure as to what offer is currently on the table, given that First Union has never received a written proposal from you as was requested on December 2, 1994. My understanding is that you initially offered an assignment of 50,000 square feet of development rights and an option to purchase First Union's property for $650,000 cash, with closing to occur sometime in March, 1995. Thereafter, you revised the offer to include an assignment of development rights, with an option to purchase First Union's property at $750,000.00, contingent upon some form of First Union financing. Neither offer required you to provide First Union with any deposit monies. Thereafter, First Union received an informal, indirect communication that you would be willing to offer development rights for First Union's property in the Downtown/Uptown development, independent of any agreement to purchase that property. During the December 2nd meeting, you had suggested the value of the Bank's property including development rights to be in the range of $14 per square foot — or in excess of $900,000. Such value

would be, in your opinion, approximately $4 per square foot higher than the current value which excludes development rights.

As you may be aware, First Union has an outstanding "as is, where is" cash offer on the subject property in the Downtown/ Uptown development, for an amount in excess of $650,000.00. You may also be aware that First Union is the holder of a Final Judgment in the amount of $750,000.00, which provides that it has a first lien on any proceeds that may be recovered in the condemnation litigation. Although there are issues that would need to be resolved favorably to the Bank before it could collect on that Final Judgment, First Union believes that its Final Judgment has value, and that it owes a duty to its depositors and shareholders to attempt to obtain a fair price for that Judgment and/or its real property. It is First Union's belief that your offers fall below what First Union would be willing to accept to resolve this matter. Accordingly, First Union is relying upon you to tell us whether you wish to negotiate any further, notwithstanding your comment that you are unwilling to offer anything further to the Bank.

Finally, immediately after the City Commission meeting on December 5, 1994 First Union hired, at its expense, an independent land planner, Kilday & Associates, to advise First Union as to the status of the Downtown/Uptown development, and the value of the development rights that you have offered to the Bank. First Union's consultants reviewed the DRI, interviewed officials from the City of West Palm Beach, and issued a written report to the Bank. Contrary to your comment to Manny Kushner yesterday that a permit could be obtained

immediately upon receipt of your development rights, our consultants have suggested that your developments rights may be worthless, and that even with the development rights, it is likely that no permits will be issued until the outstanding conditions of approval (which are estimated to involve the expenditure of several million dollars), have been complied with. Accordingly, enclosed is a copy of a letter that I have sent on this date to Michael Wright, City Administrator, to clarify the City's position as to your development rights and the utility of those rights. Mr. Wright's name was provided to Manny Kushner by Mr. Gonzalez as someone from the City of West Palm Beach who could verify your statement that upon receipt of your development rights, there would be no further impediment to immediate construction. Obviously, this point needs to be clarified immediately.

Given the foregoing outstanding issues, as well as the reported negative tenor of your remarks to Mr. Kushner yesterday, it seems it might be counterproductive for the meeting to occur today. Rather, it might be more appropriate to postpone the meeting for a day or so in order to better evaluate these issues, including First Union's receipt of Mr. Wright's response to the enclosed letter. If you decide that your wish to negotiate further with First Union, I will make myself available, however, I suggest that you have your legal counsel also present at such a meeting so that if a settlement is achieved, we can begin the process of drafting appropriate closing documentation.

Appendix N

I look forward to your written response to this letter.

Sincerely,

FIRST UNION NATIONAL BANK OF FLORIDA

s/ Nancy I. O'Brien
Nancy I. O'Brien
Senior Vice President

Enclosure

APPENDIX O — LETTER OF THE CITY OF WEST PALM BEACH DATED DECEMBER 15, 1994

The City of
West Palm Beach
"The Orchid City"

CITY ADMINISTRATOR'S OFFICE
P.O. Box 3366
West Palm Beach, Florida 33402
Tel: 407/659-8024
Fax: 407/659-8066

VIA TELECOPIER AND REGULAR MAIL

December 15, 1994

Nancy I. O'Brien
Senior Vice President
First Union National Bank of Florida
4299 N.W. 36th Street
Miami Springs, FL 33166

Re: Downtown/Uptown Development
First Union Site Located at
Okeechobee Blvd. and Dixie Highway

Dear Ms. O'Brien:

I am in receipt of your letter dated December 14, 1994 in which you request certain assurances regarding First Union's right to undertake a development on its property (the "Development") pursuant to the Downtown/Uptown DRI, as amended (the "DRI"). The City of West Palm Beach hereby provides you with the following assurances:

(1) Although there are numerous conditions that must be fulfilled prior to development beyond

Appendix O

Phase IA of the DRI and further conditions to be fulfilled prior to development beyond Phase I, there is 500,000 square feet of office space (or the equivalent trip generation of retail space) available under Phase IA without further condition, except as set forth below.

(2) Of the 500,000 square feet of office space available under Phase IA, 390,000 square feet of office space (or equivalent) has been potentially used for the Festival Marketplace Project under Resolution No. 168-91 (which may be subject to abandonment at this time for failure to meet conditions required thereunder) leaving a net of 110,000 square feet of office space (or equivalent) available under Phase IA of the DRI.

(3) First Union would have to undertake its Development as a part of Phase IA to develop without further conditions.

(4) The development application must be processed and approved as a Level Three Site Plan Review pursuant to sections 41 and 43 of the DRI and must meet the applicable land use conditions under the DRI. In addition, such governmental impact fees and/or fair share road impact fees as are applicable at the time of application for building permit must be paid.

(5) The development rights under the DRI have purportedly been severed from the ownership of

the underlying real estate, and we are advised that Advantage West Palm Beach, Inc. (whose principal is Bert Moerings) either owns or controls the Phase I development rights. In the absence of a judicial determination on the question, the City is unable to express an opinion on the validity of an assignment of development rights separate from the underlying real estate.

(6) However, any application which has the development rights attached to the real estate will be processed as described above. In those cases where the City receives an application for development from an owner within the DRI with no development rights attached, the City will likely require a judicial determination as to its duty to grant a permit. Therefore, if a portion of the development rights owned by Advantage West Palm Beach, Inc. is attached to the land owned by First Union, the City will process the application, subject to the other conditions stated herein.

(7) Please note that after December 1, 1995, a traffic study will be required prior to issuance of a building permit (See Sec. 6 of Ordinance No. 2287-89).

We trust that this provides you with the needed assurances. Please advise if you need anything further.

Appendix O

The City looks forward to a project on your site in the near future.

Sincerely,

s/ Michael J. Wright
Michael J. Wright
City Administrator

cc: Mayor Nancy Graham
Patrick N. Brown, City Attorney
Rick Greene, Planning Director
Bert Moerings

APPENDIX P — ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS DATED DECEMBER 22, 1994

THIS ABSOLUTE ASSIGNMENT OF DEVELOPMENT RIGHTS, made this 22 day of December, 1994, by Ben Moerings and Marsha Moerings, his wife, and Advantage West Palm Beach, Inc. (collectively "Assignor") to O.R.E.O., Inc., a Florida corporation ("Assignee")

WITNESSETH:

WHEREAS, the City of West Palm Beach, Florida has adopted Ordinance No. 2268-89 and 2313-89 (the "Ordinance") for the development of regional impact known as Downtown/Uptown (the "D.R.I."); and

WHEREAS, Assignor claims ownership of certain development rights for real property within the D.R.I.; and

WHEREAS, Assignee owns fee title to the real property within the D.R.I. more particularly described in Exhibit "A" attached hereto; and

WHEREAS, the parties desire that a portion of the development rights held by Assignor be assigned and transferred to Assignee;

NOW, THEREFORE, in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Assignor does hereby unconditionally and absolutely transfer, sell, set over, convey and assign to Assignee the exclusive right to utilize up to fifty thousand (50,000) square feet of retail space, or its equivalent in trip generation for office or

any other permitted uses, in connection with real property now or hereafter a part of the D.R.I. It is the intent of the parties that this assignment have the effect of reserving for the exclusive use of Assignee, its successors and assigns, the development rights for the density described herein, including but not limited to all such rights remaining for Phase 1A of the D.R.I. as set forth in the Ordinance.

Nothing in this Assignment shall be construed as requiring Assignee to assume any obligations or liabilities, including without limitation any obligations of Developer under the Ordinance.

Assignor represents and warrants to Assignee that Assignor has all necessary and proper legal authority to make this Assignment and that none of the development rights assigned hereby have been or will be assigned to any third party.

All of the development rights assigned hereby shall be freely transferable and assignable by Assignee, in whole or in part, to the owner of any real property within the D.R.I. or concurrently with the sale by Assignee of any real property within the D.R.I.

IN WITNESS WHEREOF, Assignor has caused these presents to be executed the day and year first above written.

Appendix P

ASSIGNOR:

s/ William P. Doney
s/ James W. Vance

s/ Bert J. Moerings
Bert Moerings

s/ William P. Doney
s/ James W. Vance

s/ Marsha Moerings
Marsha Moerings

Advantage West Palm Beach, Inc.

s/ William P. Doney
s/ James W. Vance

By s/ Bert J. Moerings

STATE OF FLORIDA)
)SS
COUNTY OF PALM BEACH)

The foregoing instrument was acknowledged before me this 23 day of December, 1994, by Bert Moerings who is personally known to me or produced Driver's License as identification.

s/ Hazeline F. Carson
Print Name: Hazeline F. Carson
Notary Public
My Commission Expires:

[stamp]
Hazeline F. Carson
Notary Public, State of Florida
Commission No. CC 344319
My Commission Expires
01/26/98
Bonded through Fla. Notary
Service & Bonding Co.

Appendix P

STATE OF FLORIDA)
)SS
COUNTY OF PALM BEACH)

The foregoing instrument was acknowledged before me this 23rd day of December, 1994, by Marsha Moerings who is personally known to me or produced Driver's License as identification.

s/ Kristie L. Keller
Print Name:
Notary Public
My Commission Expires:

[stamp]
KRISTIE L. KELLER
MY COMMISSION
#CC366825
EXPIRES May 7, 1998
BONDED THRU TROY
FARM INSURANCE, INC.

Appendix P

STATE OF FLORIDA)
)SS
COUNTY OF PALM BEACH)

The foregoing instrument was acknowledged before me this 23rd day of December, 1994, by Bert Moerings as President of Advantage West Palm Beach, Inc., on behalf of the corporation. He/She is personally known to me or produced driver's license as identification.

s/ Hazeline F. Carson
Print Name: Hazeline F. Carson
Notary Public
My Commission Expires:

[stamp]
Hazeline F. Carson
Notary Public, State of Florida
Commission No. CC 344319
My Commission Expires
01/26/98
Bonded through Fla. Notary
Service & Bonding Co.

APPENDIX Q — EXCERPT OF RESOLUTION NO. 136-95 OF THE CITY OF WEST PALM BEACH, FLORIDA

RESOLUTION NO. 136-95

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF WEST PALM BEACH, FLORIDA, RELATING TO A DEVELOPMENT OF REGIONAL IMPACT KNOWN AS "DOWNTOWN UPTOWN" AND TO ORDINANCE NO. 2268-89 AND ORDINANCE NO. 2287-89, AND ORDINANCE NO. 2313-89 OF THE CITY, BEING THE DEVELOPMENT ORDER OF THE CITY OF WEST PALM BEACH APPROVING THE "DOWNTOWN UPTOWN" DEVELOPMENT OF REGIONAL IMPACT; APPROVING A SITE PLAN PURSUANT TO SECTION 3, PARAGRAPH 41 OF ORDINANCE NO. 2268-89 AFORESAID, AS AMENDED, DECLARING THE SITE PLAN OF A RETAIL AND OFFICE MIXED USE BUILDING TO BE CONSISTENT WITH THE COMPREHENSIVE PLAN OF THE CITY AND WITH CITY CODE SECTION 33-15 AND SECTION 33-48 REQUIREMENTS; IDENTIFYING CERTAIN CONDITIONS; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE; AND FOR OTHER PURPOSES.

* * * * *

WHEREAS, the City Planning Board and the City Commission have undertaken a Level III Site Plan Review pursuant to Section 3, Paragraph 41, of Ordinance No. 2268-89 of the City Commission of the City of West Palm Beach, Florida, as amended, hereinafter the "Development Order", for the "Proposed Retail/Office"; and

Appendix Q

WHEREAS, the City Planning Board has reviewed and recommended approval of the "Proposed Retail/Office Site Plan", being drawing 95-01, revised March 27, 1995, and drawn by Kilday and Associates, hereinafter referred to as the "Site Plan"; the "Planting Plan", being drawing 95-01, revised March 27, 1995, and drawn by Kilday and Associates; and "Floor and Elevation Plans", being drawing 95-105, dated February 13, 1995, and drawn by Jones and Song, Architects and Planners, Inc.; copies of which are on file in the Planning, Zoning and Building Department, with the inclusion of specified conditions and limitations contained in this Resolution.

NOW THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF WEST PALM BEACH, FLORIDA that:

***SECTION 1*:** The City Commission hereby finds that the Site Plan for the construction of the 21,000 square feet of retail space and 54,310 square feet of office space "Proposed Retail/Office" meets the Development of Regional Impact conditions of approval and is consistent with the existing zoning classifications City Center General Commercial (CC3) district and Commercial Planned Development (CPD) district, and is consistent with the Comprehensive Plan of the City of West Palm Beach.

* * * *

APPENDIX R — LETTER OF THE CITY OF WEST PALM BEACH DATED AUGUST 4, 1995

The City of
West Palm Beach
"The Orchid City"

NANCY M. GRAHAM
Mayor
P.O. Box 3366
West Palm Beach, Florida 33402
Tel: 407/659-8025
Fax: 407/659-8066

August 4, 1995

Mr. Bert Moerings
Advantage West Palm Beach, Inc.
1001 Alternate A1A
Jupiter, FL 33477

Dear Bert:

On behalf of the City, I would like to take this opportunity to thank you and your Company, Advantage West Palm Beach, Inc. for your participation and support of the City's efforts to assemble the Downtown/Uptown properties, and to promote a Convention Center and high quality redevelopment project in the Downtown/Uptown area.

During the past year that the City and your Company have been cooperating on these efforts, there has been significant progress, including:

- Settlement of the eminent domain litigation relating to Okeechobee Boulevard.

- Funding of a $15,000,000 City loan for acquisition of the project.

Appendix R

- Closing on the SKOP Bank property.

- Submission of a highly competitive proposal for the development of a Convention Center.

In short, there has been a lot of cooperation and a great deal of progress. However, as we are both aware, more remains to be accomplished.

As you know, from time to time, we have had discussions about the various holdings of Advantage West Palm Beach, including real estate and development rights. During these discussions, there have been some differences of opinion concerning the extent and value of these rights. At this time, it is the City's wish to move away from our differences of opinion and in this regard I would like to provide you with the City's assurance that the City wishes, and intends, to treat you and your Company fairly in any future transactions we may have concerning the city's acquisition of your rights.

It is the City's intention, under any such acquisition process, to pay your Company fair market value for any and all rights which your company may own and which are necessary for assembly and development of the Downtown/Uptown project.

I hope that we can continue to cooperate together and that, notwithstanding our differences of opinion on these matters, we can work together to achieve a truly landmark project in the Downtown/Uptown area which will indeed serve as a gateway to the city.

Sincerely,

s/ Nancy Graham
Nancy M. Graham
Mayor

cc: Michael J. Wright, City Administrator
Patrick N. Brown, City Attorney
Robert Sanders, Deputy City Attorney

APPENDIX S — CONTRACT DATED JUNE 6, 1996

ADVANTAGE WEST PALM BEACH, INC., of West Palm Beach, Florida (Ph._____) as seller, and BADCOCK'S ECONOMY FURNITURE STORE, INC., of 512 Clematis Street, West Palm Beach, FL 33401 (Ph. 659-1170) as buyer, hereby agree that the seller shall sell and the buyer shall buy the following described property UPON THE TERMS AND CONDITIONS HEREINAFTER SET FORTH, which shall include the STANDARDS FOR REAL ESTATE TRANSACTIONS set forth on reverse side of this contract.

1. LEGAL DESCRIPTION of real estate located in Palm Beach County, State of Florida: See attached legal description.

Personal property included: Buyer and Seller agree that this transaction is for $16.00 per square foot (14,113 sq.ft.) for the roadbeds and $2.40 a square foot for absolute assignment of development rights to the roadbeds and the adjoining property.

2. PURCHASE PRICE Three Hundred Sixty Nine Thousand Eight Hundred Dollars.

Method of Payment:

(a) Deposit to be held in trust by
Butler & Brown, P.A. Trust Acct. $ 10,000.00

* * *

(d) Cash, certified or local cashier's check on closing and delivery of deed (or such greater or lesser amount as may be necessary to complete payment of purchase price after credits, adjustments and prorations).	$359,800.00
TOTAL	$369,800.00

3. TIME FOR ACCEPTANCE: If this contract is not executed by the seller and buyer on or before June 10, 1996, the aforesaid deposit shall be, at the option of the buyer, returned to him and this agreement shall be null and void. The date of contract, for purposes of performance, shall be regarded as the date when the last one of the seller and buyer has signed this contract.

4. CLOSING DATE: This contract shall be closed and the deed and possession shall be delivered on or before the 1st day of July, 1996, unless extended by other provisions of this contract.

5. PRORATIONS: Taxes, insurance, interest, rents and other expenses and revenue of said property shall be prorated as of the date of closing.

6. EVIDENCE OF TITLE: (Check ☐ (1) or ☒ (2)) Within 20 days from the date of this contract, the seller shall, at his expense, deliver to the buyer or his attorney in accordance with Standard A on reverse side either: (1) abstract (2) Title guarantee.

Appendix S

7. CONVEYANCE: Seller shall convey title to the aforesaid property to the buyer by statutory warranty deed subject to matters contained in this contract and taxes for the year of closing.

8. RESTRICTIONS, EASEMENTS, LIMITATIONS: Buyer shall take title subject to: (a) Zoning, restrictions, prohibitions, and requirements imposed by governmental authority, (b) Restrictions and matters appearing on the plat or common to the subdivision, (c) Public utility easements of record, provided said easements are located on the side or rear lines of the property, (d) Taxes for year of closing, assumed mortgages, and purchase money mortgages, if any, (e) Other: those of record. Seller warrants that there shall be no violations of building or zoning codes at the time of closing.

9. DEFAULT BY BUYER: If buyer fails to perform any of the covenants of this contract or decides not to complete transaction, all money paid as an initial earnest money deposit pursuant to this contract by buyer as aforesaid, shall be returned, if prior to closing.

10. DEFAULT BY SELLER: If the seller fails to perform any of the covenants of this contract, the aforesaid money paid by the buyer, at the option of the buyer, shall be returned to the buyer on demand; or the buyer shall have only the right of specific performance.

11. TYPEWRITTEN OR HANDWRITTEN PROVISIONS: Typewritten or handwritten provisions inserted in this form shall control all printed provisions in conflict therewith.

Appendix S

12. OTHER AGREEMENTS: No agreements or representations, unless incorporated in this contract, shall be binding upon any of the parties.

13. SPECIAL CLAUSES:

Buyer is aware that said property may be subject to eminent domain proceedings by the City of West PALM BEACH.

Date Executed by Buyer
June 6, 1996

WITNESSES: (Two are required)

s/ [illegible]

s/ [illegible]

s/ James C. Baber, III *(SEAL)*
JAMES C. BABER, III,
President
BADCOCK'S ECONOMY
FURNITURE STORE, INC.
Buyer

* * *

Appendix S

Date Executed by Seller
June 6, 1996

WITNESSES: (Two are required)

s/ [illegible]

s/ [illegible]

s/ Bert J. Moerings *(SEAL)*
BERT MOERINGS, on behalf of ADVANTAGE WEST PALM BEACH, INC.
Seller

* * *

Appendix S

Between ***ADVANTAGE WEST PALM BEACH, INC.***, SELLER and ***BADCOCK'S ECONOMY FURNITURE STORE, INC.***, BUYER.

The Purchase Price breaks down as follows:

Real Property—14,113 square feet at $16.00 per foot	$225,808.00
Commercial Development Rights — 60,000 square feet at $2.40 per foot.	144,000.00
Total	$369,808.00

The Development Rights are Phase IA development rights as defined in the Downtown\Uptown Development of Regional Impact, Development Order City of West Palm Beach Ordinance Numbers 2268-89, 2297-89 and 2313-89. The Development Rights shall be conveyed by Absolute Assignment.

The Deposit of $10,000.00 will be held trust by Buyer's attorney, Butler & Brown, P.A. Trust Account within (5) five business days of the execution of this Agreement. If the deposit is not placed in trust in accordance with this paragraph, then this agreement shall be terminated and deposit money received shall be returned to Buyer.

This contract shall be closed with 14 days of execution by Buyer and Seller. In the event Buyer is unable to close on "Block 57" within the time described herein then this agreement shall be terminated and deposits shall be returned to Buyer.

Appendix S

Gonzalez Associates, Inc. (a Florida corporation) is acting as Broker for Seller and will receive a commission equal to 7% of the Purchase Price earned and payable upon closing of this transaction.

Dated this 6th day of June, 1996.

BY s/ James C. Baber, III
JAMES C. BABER, III,
PRESIDENT
BADCOCK'S ECONOMY
FURNITURE STORE, INC., Buyer

BY s/ Bert J. Moerings
BERT MOERINGS, PRESIDENT
ADVANTAGE WEST PALM
BEACH REALTY, INC.
Seller.

Supreme Court, U.S.
FILED
MAY 7 1999
CLERK

No. 98-1471

IN THE

Supreme Court of the United States

ADVANTAGE WEST PALM BEACH, INC., BERT MOERINGS, and MARSHA MOERINGS,

Petitioners,

v.

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY,

Respondent.

On Petition for Writ of Certiorari to the Fourth District Court of Appeal for the State of Florida

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM P. DONEY
VANCE & DONEY
1615 Forum Place
Suite 4C
West Palm Beach, FL 33401
(561) 684-5544
-and-
ARNOLD M. WEINER
LAW OFFICES OF
ARNOLD M. WEINER
4141 N.E. Second Avenue
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PATRICK N. BROWN
City Attorney
Counsel of Record
CLAUDIA M. MCKENNA
Deputy City Attorney
MAYRA RIVERA-DELGADO
Assistant City Attorney
CITY OF WEST PALM BEACH
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Attorneys for Respondent

152771

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Table of Appendices	v
Statement of the Case	1
A. Introduction	1
B. Background	1
C. The Eminent Domain Proceedings	4
D. The Appeal	5
Reasons for Denying the Writ	9
I. The Petition For Writ Of Certiorari Should Be Denied Because The State Court Did Not Decide A Question Of Federal Law.	9
A. Jurisdictional Rule 10(c) requires that the state court decide an important question of federal law.	9
B. The state court did not decide an important question of federal law that has not been, but should be, settled by this Court.	9
C. The state court did not decide an important federal question in a way that conflicts with relevant decisions of this Court.	12

Contents

Page

D. Petitioners incorrectly state the question presented to this Court and confuse the "transfer of development rights" issue. 15

E. Petitioners fail to comply with Rule 14(1)(g)(i). 16

II. Assuming Arguendo That A Federal Question Was Raised And/Or Ruled On In The State Court Below, The Petition For Writ Of Certiorari Should Be Denied Because The State Court Decision Was Based On Independent And Adequate State Law Grounds. 18

A. This Court lacks jurisdiction to review a state court decision which is based on independent and adequate state law grounds. 19

B. The determination of what constitutes "property" is a matter of state law. ... 20

C. The state court decision that Petitioners hold no property interest is "predicated entirely on the specific language of the subject DRI Development Order," an ordinance adopted pursuant to a Florida statute. 21

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Board of Regents v. Roth, 408 U.S. 564 (1972) ... 20, 21

Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10 (1935) 20

Coleman v. Thompson, 501 U.S. 722 (1991) 19, 20

Cramp v. Board of Public Instruction, 368 U.S. 278 19

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) ... 19

Herb v. Pitcairn, 324 U.S. 117 (1945) 20

Herndon v. Georgia, 295 U.S. 441 (1935) 19

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965) 19, 22

Klinger v. Missouri, 13 Wall. 257, 20 L. Ed. 635 (1872) 19

Lambrix v. Singletary, 520 U.S. 518 (1997) 19

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 7

Mitchell v. W.T. Grant Company, 416, U.S. 600 (1974) 20

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 7, 13, 14

Cited Authorities

Page

Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978) 12, 13

Phillips v. Washington Legal Foundation, 524 U.S. 156; 118 S. Ct. 1925 (1998), ... 21

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 13, 14, 15

Statutes:

42 U.S.C. § 1983 14

Florida Statutes:

Chapter 380 21

Section 163.356 4

Section 380.06(1) 1

Section 380.06(15) 1

United States Constitution:

Fifth Amendment 13, 14, 16

Rules:

United States Supreme Court Rule 10(c) 9

United States Supreme Court Rule 14(1)(g)(i) 17, 18

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The District Court Of Appeal Of Florida For The Fourth District Dated October 14, 1998 Rehearing And Rehearing En Banc December 16, 1998 ..... 1a

Appendix B — Reply To Appellants' Motion For Rehearing And/Or *En Banc* Rehearing And For Certification Dated November 9, 1998 ..... 4a

Appendix C — Appellants' Motion For Rehearing And/Or *En Banc* Rehearing And For Certification Dated October 26, 1998 ..... 10a

Appendix D — Opinion Of The District Court Of Appeal Of The State Of Florida For The Fourth District Dated And Filed October 14, 1998 .... 22a

Appendix E — Judgment Regarding Development Rights Of The Circuit Court Of The Fifteenth Judicial Circuit, In And For Palm Beach County, Florida Dated September 22, 1997 ..... 25a

Appendix F — Agreed Order Of Taking Of The Circuit Court Of The 15th Judicial Circuit Of Florida, In And For Palm Beach County Dated March 6, 1997 ..... 32a

Appendix G — Ordinance No. 2268-89 Of The City Of West Palm Beach, Florida Dated March 20, 1989 ..... 39a

Appendices

Page

Appendix H — Trial Exhibit No. 72, Chart Of Downtown/Uptown Purported Assignments Of Development Rights 119a

Appendix I — Trial Exhibit No. 105, Map Depicting Lands Within DRI Encumbered by Southeast Bank Mortgage 120a

Appendix J — Trial Exhibit No. 106, Map Depicting Lands Within DRI Encumbered by Delta Funding Mortgage 121a

Appendix K — Excerpt From Petitioners' Initial Brief Filed In The District Court Of Appeal Of Florida For The Fourth District 122a

STATEMENT OF THE CASE

A. Introduction

In the State of Florida, large-scale land development projects are governed by both state and local law. A "development of regional impact" is defined as "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety or welfare of citizens of more than one county." Section 380.06(1), *Fla. Stat.* At the culmination of the development of regional impact review process, the local government (typically a city or county) renders a decision on the development application that if approved results in the adoption of a local ordinance known as the development order. Section 380.06(15), *Fla. Stat.* All development within the project is then required to be in conformance with the terms and conditions of the development order. In a sense, a development order becomes a "super zoning ordinance" for the lands in question.

B. Background

On March 20, 1989, the City of West Palm Beach adopted City Ordinance No. 2268-89 constituting approval of the development order (Development Order) for a project commonly referred to as the Downtown Uptown Development of Regional Impact (DRI). The DRI was generally a privately funded project to redevelop approximately 77 acres of land near downtown West Palm Beach. At the time of development approval, all lands within the project were owned by the original developer, the Downtown Uptown Venture (DUV). The Development Order approved a master plan for the development of all lands within the DRI. (Appendix G).

The Development Order authorized certain specified levels of office, retail, hotel and residential development. The Development Order did not, however, place specific densities or uses on specific properties but merely allocated total densities and uses to the project as a whole. (App. E, 27a). Governmental review and approval were expressly required by the terms of the Development Order prior to each development stage. These mandatory local government approvals applied to platting, subdivision and site plan approval. More specifically, a Level III Site Plan review by the City Planning Board and City Commission was required for each specific site development proposal. (App. G, 86a, 87a; App. E, 27a). Prior to the issuance of any building permits, municipal subdivision and platting review and approval were required. (App. G, 88a).

While the Development Order permits flexibility by allowing the transfer of densities and uses, it does not contain the term "development rights" and does not address development rights at all. The Development Order makes no provision for the transfer of development rights or for their severance or separation from the underlying real estate. The City of West Palm Beach has never adopted an ordinance permitting or regulating the transfer of development rights. (App. E, 28a).

Shortly after adoption of the Development Order, DUV entered into numerous mortgage transactions, thereby encumbering title to nearly all lands within the DRI. Every one of these mortgages pledged fee simple title as security for the loans. Appendix I and Appendix J graphically depict the lands on which fee simple title was pledged as security for two of the major mortgages held by Southeast Bank and Delta Funding. By early 1990, the project became

financially troubled and ultimately the numerous mortgages were foreclosed. As a result of foreclosure sales and tax sales, ownership of the lands within the DRI became extremely fragmented. (App. E, 28a).

After adoption of the Development Order and after DUV pledged fee simple title as security for the various mortgages, but before the foreclosure proceedings were finalized, DUV executed certain documents which purported to convey so-called "development rights" to Petitioners and other individuals. These purported assignments of development rights were made without consent of the various mortgage holders, without the knowledge or consent of the City of West Palm Beach as the local zoning authority, and without any other governmental authorization or review. Many of the purported assignments were not recorded in the public records of Palm Beach County and would not have surfaced in a title examination. (App. E, 29a, 30a). A chart summarizing the numerous purported assignments of development rights is shown in Appendix H.

Petitioners' claim to ownership of the so-called development rights created a cloud on title to all lands within the DRI. If Petitioners' claim were valid, the other fee owners within the DRI would have held bare legal title to their property, and Petitioners would have been in a position to prohibit all other owners from improving or developing their property. As of the date of filing the eminent domain proceedings below, Petitioners owned about 5% of the lands within the DRI, but claimed to own about 90% of the development rights for the entire project. (App. E, 28a).

C. The Eminent Domain Proceedings

Respondent, West Palm Beach Community Redevelopment Agency, is a public agency created pursuant to Section 163.356, *Fla. Stat.* In general, such redevelopment agencies exist to facilitate the redevelopment of slum and blighted areas within their jurisdictions. The lands of the DRI are within the jurisdiction of Respondent.

Prior to June of 1996, Respondent purchased certain lands within the DRI. On June 21, 1996, Respondent commenced eminent domain proceedings to acquire fee simple title to the remaining lands within the DRI together with all rights of development appertaining to said property under the Development Order. The public purpose for the proposed acquisition was to assemble all lands within the original project and to make the same available for private redevelopment. The eminent domain proceedings were necessitated by the fragmented fee ownership and the cloud on title created by the purported assignments of development rights.

On January 6, 1997, the trial court entered an Agreed Order of Taking. Pursuant to this Order, upon payment by Respondent of the sum of $1,911,000 into the Court Registry, fee simple title to certain real property owned by Petitioners and title to all so-called development rights vested in Respondent. (App. F, 33a, 35a). In the Agreed Order, Petitioners and Respondent recited that "a dispute exists between the parties hereto as to the ownership, validity and value, if any, of certain development rights . . ." (App. F, 35a). Moreover, Respondent expressly reserved its right to "argue or contend that Defendants (Petitioners herein) are not the lawful owners of said rights, that said

rights were not validly assigned, that said rights have no value or any other defense that may be asserted . . ." (App. F, 37a).

Later in the eminent domain proceedings, Respondent filed a motion in limine requesting that the court determine the legal validity of Petitioners' claim to ownership of the disputed development rights. Following a three day non-jury trial, the trial court ruled that DUV could not, by mortgage, legally pledge fee simple title to the subject lands and then purport to strip off the development rights and convey them to third parties. (App. E, 30a). The trial court also specifically found that the development rights were not separate intangibles created by passage of the DRI Development Order. *Id.*

In its conclusions of law, the trial court determined that:

> The development rights in question have no value. They were not created by the enactment of the DRI. They do not exist separate and apart from the underlying realty. They were not severable from the realty . . . These "rights" did not exist to be transferred or assigned.

Id.

D. The Appeal

Petitioners appealed the trial court's Judgment Regarding Development Rights (judgment) to the Fourth District Court of Appeal for the State of Florida (appellate court). In their Initial Brief, Petitioners framed the issue on appeal as follows:

> The question presented by this case is whether a governmental authority must compensate the holder of valuable development rights when these rights are specifically taken in a condemnation proceeding.

(Appendix K). Petitioners' misstatement of the issue on appeal below assumes the creation and existence of development rights. As noted above, the trial court unequivocally ruled that under the facts of this case and the terms of the Development Order, no such development rights were created to be assigned or transferred. The "rights" could not have been "taken" because they were never created.

In a *per curiam* opinion, the appellate court affirmed the judgment below. (Appendix D). Specifically, the appellate court considered whether the Development Order created the so-called "development rights" in question. Calling the final judgment "concise" and "well reasoned," the appellate court agreed that the "DRI did not create a species of property known as transferrable development rights." Moreover, the appellate court then concluded that:

> Neither the language of the DRI, nor the development process contemplated by the ordinance, support the conclusion that transferrable development rights were created for which appellants are entitled to be compensated.

(App. D, 24a).

Petitioners sought rehearing, rehearing en banc and certification of the court's decision to the Supreme Court of Florida as passing on a question of great public

importance. (Appendix C). Despite the specific language in the appellate court opinion and in the judgment it affirmed, Petitioners began their rehearing argument by stating: "The Court recognized that Advantage was the owner of development rights under a development order . . ." (App. C, 11a). Petitioners incorrectly characterized the decision of the appellate court as follows:

> . . . in the absence of a TDR enactment, the panel opinion means that a governmental body may take development rights without compensation to the owner thereof if such rights have been assigned, sold, or transferred separately from a parcel of land.

(App. C, 14a). Relying on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and various legal articles discussing property rights, Petitioners claimed that the panel decision "is at odds with the very nature of property in American law." (App. C, 16a).

Finally, Petitioners contended that "the issue addressed by the panel opinion, *i.e.*, whether development rights created by a DRI development order are compensable, presents substantial questions of property law and constitutional principle." (App. C, 18a). Accordingly, Petitioners asked that the case be certified to the Supreme Court of Florida as passing upon a question of great public importance.

In response to Petitioners' motion for rehearing, Respondent initially pointed out that the appellate opinion in no way supported the proposition that Petitioners were

the lawful owners of development rights. (App. B, 5a). On the contrary, the panel opinion expressly concluded that the Development Order did not create transferable development rights. Respondent next suggested that since the panel's decision "is founded entirely upon the specific language of the subject Development Order, it is unlikely that the case will have precedential value and did not address an issue of great public importance." (App. B, 7a).

The appellate court denied Petitioners' motion for rehearing, rehearing en banc and for certification. (Appendix A). The court observed that Petitioners misread the panel opinion:

> . . . when they assert that the decision "plainly states that the existence of an enactment controlling the transfers of development rights (TDRs) is a prerequisite to a compensable taking of so-called 'floating' development rights." As appellee correctly points out, the panel opinion is "predicated entirely on the specific language of the subject DRI Development Order."

(App. A, 3a).

* * *

Thereafter, on March 15, 1999, Petitioners filed a petition for writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE STATE COURT DID NOT DECIDE A QUESTION OF FEDERAL LAW.

A. Jurisdictional Rule 10(c) requires that the state court decide an important question of federal law.

Rule 10 requires compelling reasons for granting a writ and Rule 10(c) contemplates that petitions presented to this Court involve an important question of federal law. Rule 10(c) provides that review on certiorari may be considered when:

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

As more fully set forth below, the question presented before this Court does not involve any question of federal law, let alone an important federal question.

B. The state court did not decide an important question of federal law that has not been, but should be, settled by this Court.

The issue before the trial court was whether "development rights" created pursuant to the Development Order:

> constitute a type of property interest, apart from the realty within the DRI, with respect to which . . . [the Respondent] is required to provide "full compensation" under Article X of the Florida Constitution.

(App. E, 25a, 26a). The trial court decided this issue by making the following conclusions of law:

> The development rights in question have no value. They were not created by the enactment of the DRI. They do not exist separate and apart from the underlying realty. They were not severable from the realty.
>
> Neither the City nor the Community Redevelopment Agency is estopped in any way from contesting the assignability or value of the subject development rights assigned to Advantage.
>
> These "rights" did not exist to be transferred or assigned.
>
> Defendants, Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings hold no separate, compensable property interest known as development rights, are due no compensation from the West Palm Beach Community Redevelopment Agency and hold no apportionment claim against the owners of land within the DRI.

(App. E, 30a, 31a). The trial court, when identifying the issue, referred to the eminent domain clause in the Florida constitution. However, the Court did not need to reach any constitutional issue. Relying only on an interpretation of the Development Order, the court found that Petitioners had no property interest, rendering analysis under the Florida Constitution unnecessary.

In its *per curiam* decision, the appellate court affirmed the judgment of the trial court. The court stated the issue on appeal as follows:

> The issue in this case is whether appellants are entitled to compensation for certain "development rights" as part of a taking in eminent domain. Appellants contended that these development rights were created by City of West Palm Beach Ordinance No. 2268-89, as amended, referred to as the Downtown Uptown Development of Regional Impact ("DRI").

(Appendix D, 23a). After adopting the trial court's conclusions of law, which are set forth above, the appellate court held as follows:

> We agree with the final judgment entered by the trial court. The DRI did not create a species of property known as transferrable development rights. Unlike Palm Beach County, the City of West Palm Beach has never adopted a Transfer of Development Rights Ordinance. Neither the language of the DRI, nor the development process contemplated by the ordinance, support the conclusion that transferrable development

> rights were created for which appellants are entitled to be compensated.

(Appendix D, 24a). On motion for rehearing, the appellate court further held as follows:

> Appellants' motions for rehearing, rehearing en banc, and for certification are denied. Appellants misread the panel opinion when they assert that the decision "plainly states that the existence of an enactment controlling the transfers of development rights (TDRs) is a prerequisite to a compensable taking of so-called 'floating' development rights." As appellee correctly points out, the panel opinion is "predicated entirely on the specific language of the subject DRI Development Order."

(Appendix A, 3a).

It is clear that not only were the state court decisions based solely on Florida law, but the decisions were based entirely on an interpretation of a local ordinance or development order adopted pursuant to a Florida statute.

C. The state court did not decide an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioners claim, incorrectly, that the decision of the state court "is in conflict with this Court's precedent on the value of severable development rights." (*See* Petition for Writ of Certiorari, page 13.) In support of this proposition, the Petitioners rely mainly on *Penn Central Transportation*

Company v. City of New York, 438 U.S. 104 (1978); *Nollan v. California Coastal Com'n.*, 483 U.S. 825 (1987); and *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). These cases addressed either unrelated jurisdictional issues or the compensability of property rights in cases brought pursuant to the Takings Clause of the Fifth Amendment to the United States Constitution. None of these cases involves a determination of what constitutes "property," or the interpretation of a local ordinance.

Petitioners' contention that the subject case conflicts with established decisions of this Court is erroneous and based upon a misstatement of the rulings below. In fact, the courts below simply ruled that under the terms of the local Development Order and the facts of this case, Petitioners held no property interest known as "development rights" and therefore no compensation was due from Respondent.

In *Penn Central*, *supra*, this Court addressed whether a city's refusal to allow the building of a multi-level structure was compensable under the Takings Clause of the Fifth Amendment to the United States Constitution. This Court held that the property owners could not establish a taking merely by showing that they had been denied the right to develop the superadjacent airspace. In *Penn Central*, *supra*, this Court was not faced with an eminent domain case. Nor was the Court required to make a determination of whether or not the rights involved constituted "property" under New York law. The question before this Court in *Penn Central*, *supra*, was whether or not the denial of the right to develop the superadjacent airspace constituted a taking compensable under the Takings Clause of the Fifth Amendment to the United States Constitution. This Court held that it did not.

In *Nollan*, *supra*, this Court entertained a question of whether under the Fifth Amendment takings clause a property owner should be compensated for the imposition of a mandatory easement across the owner's property required as a condition of development approval. The facts of the case did not involve a taking pursuant to the state's eminent domain proceedings. To the contrary, this Court expressly recognized that the case did not involve a taking under California's eminent domain proceedings. The Court declined to review the question under the scope of California's eminent domain provisions, particularly given the fact that the state court did not rest its decision upon California law.[1] Further, the Court did not have to determine whether the landowner's rights constituted "property" under California law. Rather, the Court determined only whether or not the infringement of these rights was compensable pursuant to the Takings Clause of the Fifth Amendment to the United States Constitution.

In *Suitum*, *supra*, this Court considered the ripeness of a cause of action alleging a regulatory taking claim filed under 42 U.S.C. § 1983 and the Takings Clause of the Fifth Amendment to the United States Constitution. Unlike the case at bar, *Suitum* involved a highly regulated program of

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1. In declining to entertain the question under California eminent domain proceedings, the court stated:

> [G]iven the fact that . . . the Court of Appeal did not rest its decision on Art. X, § 4, post, at 3162, we should assuredly not take it upon ourselves to resolve this question of California constitutional law in the first instance.

Nollan, 483 U.S. at 832.

transferrable development rights which were specifically created by state law. This Court did not address whether or not the rights in question constituted "property," or whether or not they were compensable. Rather, this Court addressed only the ripeness of *Suitum*'s claim and explained as follows:

> While the pleadings raise issues about the significance of the TDRs both to the claim that a taking has occurred and to the constitutional requirement of just compensation, we have no occasion to decide, and we do not decide, whether or not these TDRs may be considered in deciding the issue of whether there has been a taking in this case, as opposed to the issue of whether just compensation has been afforded for such a taking. The sole question here is whether the claim is ripe for adjudication, even though Suitum has not attempted to sell the development rights she has or is eligible to receive. We hold that it is.

Id., 520 U.S. at 728.

D. Petitioners incorrectly state the question presented to this Court and confuse the "transfer of development rights" issue.

Petitioners incorrectly state the "Question Presented" for this Court's review, as follows:

> Are intangible development rights created by a governmental development order "property," within the meaning of the Takings Clause of the Fifth Amendment to the United States

> Constitution, for the taking of which development rights an owner must be compensated by the government in an eminent domain proceeding?

(Petition for a Writ of Certiorari, Page i). The "question presented" by Petitioners mistakenly assumes the creation and existence of the so-called development rights by the Development Order. This assumption was rejected by both the trial court and the appellate court. The Florida courts, upon review of the DRI approval process, the terms of the development order, the pledging of fee title for third party mortgages, and other factual matters, determined that no "development rights" were created by the Development Order. Since no development rights were created, Petitioners own no property interest which has been taken by eminent domain. Petitioners were therefore due no compensation. Simply put, no issue is before this Court pertaining to the Takings Clause of the Fifth Amendment to the United States Constitution.

In addition, throughout this litigation, Petitioners have confused the Development Order in this case with formal transfer of development rights (TDR) programs. These programs are typically enacted in conjunction with historic preservation or environmental protection legislation. TDR programs are authorized, established, and regulated by specific statutory provisions or local ordinance. Generally, such programs authorize property owners to transfer the development potential from a protected ("sending") property to utilize the development potential on another ("receiving") property. The "sending" and "receiving" properties are generally within certain clearly defined geographical areas. Petitioners' repeated reference to cases interpreting "TDR"

programs, when there is no such program in this case, is misleading and confuses the issue before this Court.

E. Petitioners fail to comply with Rule 14(1)(g)(i).

Rule 14(1)(g)(i) requires that a petition for writ of certiorari seeking review of a state court proceeding based upon a federal question shall contain:

> (g) A concise statement of the case setting out the facts material to consideration of the questions presented, and also containing the following:
>
> > (i) If a review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this

> subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

Id. Petitioners have failed to specify when and how a federal question was raised or passed on in the state court proceedings below. Petitioners have not provided this Court with any references from the record below that demonstrate that a federal question was timely and properly raised. Accordingly, Petitioners failed to comply with Rule 14(1)(g)(i).

* * *

In summary, the state court did not decide an important question of federal law and Petitioners failed to demonstrate where and how any federal question was timely and properly raised. The petition for writ of certiorari should be denied.

II.

ASSUMING ARGUENDO THAT A FEDERAL QUESTION WAS RAISED AND/OR RULED ON IN THE STATE COURT BELOW, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE STATE COURT DECISION WAS BASED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

As demonstrated above, no federal question was timely and properly raised and/or ruled upon by the state courts below. However, assuming arguendo that a federal question was raised and/or ruled on in the courts below, the petition should be denied because the state court decision was based upon independent and adequate state law grounds.

A. This Court lacks jurisdiction to review a state court decision which is based on independent and adequate state law grounds.

It is a well settled doctrine that this Court will not review a decision of a state court, even if it involves a federal question, if the state court decision rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 728 (1991); *See also Lambrix v. Singletary*, 520 U.S. 518, 522 (1997); *e.g., Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L. Ed. 635 (1872). This doctrine applies whether the state law ground is substantive or procedural. *Coleman*, 501 U.S. at 728; *see, e.g., Fox Film, supra*; *Herndon v. Georgia*, 295 U.S. 441 (1935).

Whether or not a state court decision is based on independent and adequate state grounds is a jurisdictional question, which, if answered in the affirmative, would result in lack of jurisdiction to review the state court decision. As observed by this Court:

> It is undoubtedly "the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment."

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 489 (1965) (citing *Fox Film Corp. v. Miller*, 296 U.S. 207, 210; *Cramp v. Board of Public Instruction*, 368 U.S. 278). The rationale underlying this doctrine has been explained by this Court as follows:

> In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

Coleman, 501 U.S. at 729 (citing *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.")).

B. The determination of what constitutes "property" is a matter of state law.

It has been categorically established by this Court that "the definition of property rights is a matter of state law." *Mitchell v. W.T. Grant Company*, 416, U.S. 600, 604 (1974); *see also Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935) ("Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law"). As explained by this Court in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972):

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Recently, in *Phillips v. Washington Legal Foundation*, 524 U.S. 156; 118 S. Ct. 1925 (1998) (an action originally filed in the federal district court) this Court had occasion to review whether interest income generated by funds held in "Interest On Lawyers Trust Account" accounts constitutes private property for purposes of the federal Takings Clause. Relying on *Roth*, *supra*, this Court emphasized that the determination of what constitutes property for purposes of a takings claim is a matter of state, rather than federal law. In so holding, this Court explained:

> Because the Constitution protects, rather than creates, property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.' "

Id. at 524 U.S. at __; 118 S. Ct. at 1930 (citations omitted.)

C. The state court decision that Petitioners hold no property interest is "predicated entirely on the specific language of the subject DRI Development Order," an ordinance adopted pursuant to a Florida statute.

The decision of the state court below was based on a determination of whether Petitioners were holders of a property interest under the specific terms of the Development Order for the DRI adopted pursuant to Chapter 380, Florida Statutes. In its ruling on the Motion for Rehearing, the appellate court held that the *per curiam* panel opinion is "predicated entirely on the specific language of the subject DRI Development Order." The courts below made no reference to any source of federal law nor did the state courts rely on or interpret the

Florida Constitution.[2] Instead, the state courts relied solely on the terms of an ordinance that is entirely a creature of Florida statutory law. Accordingly, the decision of the state court was based upon independent and adequate state law grounds.

* * *

In summary, this Court lacks jurisdiction over state court decisions based on independent and adequate state grounds. The definition of property rights is exclusively a matter of state law. The state courts below determined that Petitioners held no property interest under Florida law.

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2. As previously mentioned, when identifying the issue the trial court referred to the eminent domain clause in the Florida Constitution. Relying only on an interpretation of the Development Order, the trial court found that Petitioners had no property interest, rendering any constitutional analysis unnecessary. Nevertheless, had the court relied on the Florida Constitution, this Court would lack jurisdiction over this matter because exclusive reliance on a state constitutional provision is an independent and adequate state ground. *See Jankovich, supra.*

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE FOURTH DISTRICT DATED OCTOBER 14, 1998 REHEARING AND REHEARING EN BANC DECEMBER 16, 1998

ADVANTAGE WEST PALM BEACH, INC., Bert Moerings, and Marsha Moerings, Appellants,

v.

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, INC., Appellee.

No. 97-3525.

District Court of Appeal of Florida,
Fourth District.

Oct. 14, 1998.

Rehearing and Rehearing En Banc
Dec. 16, 1998.

* * *

PER CURIAM.

The issue in this case is whether appellants are entitled to compensation for certain "development rights" as part of a taking in eminent domain. Appellants contended that these development rights were created by City of West Palm Beach Ordinance No. 2268-89, as amended, referred to as the Downtown Uptown Development of Regional Impact

("DRI"). After a three-day trial on this issue, the trial court entered a concise, well reasoned final judgement which held:

> The development rights in question have no value. They were not created by the enactment of the DRI. They do not exist separate and apart from the underlying realty. They were not severable from the realty.
>
> Neither the City nor the Community Redevelopment Agency is estopped in any way from contesting the assignability or value of the subject development rights assigned to Advantage.
>
> These "rights" did not exist to be transferred or assigned.
>
> [Appellants], Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings hold no separate, compensable property interest known as development rights, are due no compensation from the West Palm Beach Community Redevelopment Agency and hold no apportionment claim against the owners of land within the DRI.

We agree with the final judgment entered by the trial court. The DRI did not create a species of property known as transferrable development rights. Unlike Palm Beach County, the City of West Palm Beach has never adopted a Transfer of Development Rights Ordinance. Neither the

language of the DRI, nor the development process contemplated by the ordinance, support the conclusion that transferrable development rights were created for which appellants are entitled to be compensated. The opaque references by the City's attorney during a closing argument in a different case did not give rise to an estoppel against inconsistent positions. This is not the rare and exceptional case that justifies the application of the doctrine of equitable estoppel. See State Dep't of Revenue v. Anderson, 403 So.2d 397, 400 (Fla.1981).

AFFIRMED.

POLEN, GROSS and TAYLOR, JJ., concur.

ON MOTION FOR REHEARING AND/OR EN BANC REHEARING AND FOR CERTIFICATION

PER CURIAM.

Appellants' motions for rehearing, rehearing en banc, and for certification are denied. Appellants misread the panel opinion when they assert that the decision "plainly states that the existence of an enactment controlling the transfers of development rights (TDRs) is a prerequisite to a compensable taking of so-called "floating" development rights." As appellee correctly points out, the panel opinion is "predicated entirely on the specific language of the subject DRI Development Order."

POLEN, GROSS and TAYLOR, JJ., concur.

APPENDIX B — REPLY TO APPELLANTS' MOTION FOR REHEARING AND/OR *EN BANC* REHEARING AND FOR CERTIFICATION DATED NOVEMBER 9, 1998

IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 97-3525

ADVANTAGE WEST PALM BEACH, INC., et al.,

Appellants,

vs.

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY,

Appellee.

REPLY TO APPELLANTS' MOTION FOR REHEARING AND/OR *EN BANC* REHEARING AND FOR CERTIFICATION

Appellee, WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, in response to the above-referenced Motion would show as follows:

MOTION FOR REHEARING

1. Appellants' Motion for Rehearing is in direct violation of Rule 9.330, *Fla.R.App.P.*. The Motion, in its entirety, is merely a reargument of the issues set forth in

Appendix B

Appellants' Initial and Reply Briefs and at Oral Argument before this Court. See also *Lawyers Title Insurance Corporation vs. Reitzes*, 631 So.2d 1100 (Fla. 4 DCA 1993). Appellants are simply rearguing the merits of this case.

2. Paragraph 1 of Appellants' Motion for Rehearing misstates this Court's Opinion of October 15, 1998, a copy of which is attached. No where in the Opinion does this Court "recognize that Advantage (Appellant) was the owner of development rights under a Development Order issued by the City of West Palm Beach." (Appellants' Motion for Rehearing, paragraph 1). On the contrary, the Opinion agrees with and adopts Judge Fine's Final Judgment which held (in part) as follows:

> The development rights in question have no value. They were not created by the enactment of the DRI. They do not exist separate and apart from the underlying realty. They were not severable from the realty. . . . These "rights" did not exist to be transferred or assigned. Appellants . . . . . hold no separate, compensable property interest known a development rights. . . . . .

3. In support of its Motion for Rehearing, Appellants then contend that:

A. This Court "failed to consider" certain provisions of the Development Order pertaining to approved levels of development and flexibility permitted by the Development Order. (Appellants' Motion for Rehearing, paragraph 2). Appellants made this precise argument on pages 21 - 23 of its Initial Brief and pages 1 and 2 of its Reply Brief.

Appendix B

B. This Court "overlooked" Section 14 of the Development Order. (Appellants' Motion for Rehearing, paragraph 3). This Section is the boiler plate successors and assigns provision relied upon by Appellants on pages 37 - 39 of its Initial Brief. The same provision of the Development Order was also argued on pages 5 - 7 of Appellants' Reply Brief.

C. This Court's ruling "overlooks or fails to consider" that the alleged development rights had in fact been purchased and sold for valuable consideration. (Appellants' Motion for Rehearing, paragraph 4). This point is again clearly a rehash of Appellants' argument in its Initial Brief (see pages 44 - 46.)

MOTION FOR REHEARING EN BANC

4. Appellants contend that the Court's ruling "presents an important policy question that warrants *En Banc* review by the full court." Appellants then again misstate the Court's Opinion by asserting that "The panel decision plainly states that the existence of an enactment controlling the transfer of development rights (TDRs) is a prerequisite to a compensable taking of so-called "floating" development rights. That is, in the absence of a TDR enactment, the panel opinion means that a governmental body may take development rights without compensation to the owner thereof if such rights have been assigned, sold or transferred separately from a parcel of land." (Appellants' Motion for Rehearing, paragraph 7).

5. This Court's Opinion says nothing of the sort. In agreeing with Judge Fine's Final Judgment, this Court

simply (and correctly) concluded that "The DRI did not create a species of property known as transferrable development rights. . . Neither the language of the DRI, nor the development process contemplated by the ordinance, support the conclusion that transferrable development rights were created for which Appellants are entitled to be compensated."

6. This Court's Opinion, as written, is predicated entirely on the specific language of the subject DRI Development Order. While it is correct, as noted by this Court, that the City of West Palm Beach has never adopted a transfer of development rights ordinance, it is certainly a strained reading of this Court's Opinion to conclude that unless and until a governmental entity adopts a formal TDR ordinance, there can exist no species of property known as transferrable development rights for which the payment of compensation is required. Since this Court's Opinion is founded entirely upon the specific language of the subject Development Order, it is unlikely that this case will have great precedential value for any future real estate transactions or court proceedings as contended by Appellants. Certainly, for this reason, the panel's decision is not of exceptional importance.

7. The remainder of the points raised by Appellants' Motion for Rehearing *En Banc*, are again a re-hash of the identical points argued in Appellants' Initial and Reply Briefs including citations to case law and other authorities relied upon by Appellants in their previous Briefs. (Appellants' Motion for Rehearing, paragraphs 9,10,11,12).

Appendix B

MOTION FOR CERTIFICATION

8. Appellants next contend that the subject case should be certified to the Florida Supreme Court as passing on a question of great public importance. In support of its position, Appellants contend that:

A. "It is critical that all participants in the (DRI) process, from both the private and public sector, have a definitive understanding of the their rights and obligations." (Appellants' Motion for Rehearing, paragraph 15).

B. "The panel's opinion will foster widely divergent treatment of development rights in eminent domain and inverse condemnation proceedings." (Appellants' Motion for Rehearing, paragraph 16).

C. "The ruling that 'floating development rights' have compensable value only when there is a governing TDR ordinance may well encourage counties and municipalities to repeal such ordinances, in hope of being able to take such development rights without having to pay monies from public coffers." (Appellants' Motion for Rehearing, paragraph 17).

9. For the reasons set forth above, this argument again clearly misstates and over-broadens the Court's Opinion. Further, this Court's Opinion is not of great public importance because of the Court's reliance on the precise language set forth in the subject Development Order and the fact specific nature of the issues in this case.

Appendix B

WHEREFORE, Appellee respectfully requests that this Court deny Appellants' Motion for Rehearing and/or *En Banc* Rehearing and for Certification.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the following service list this 9th day of November, 1998.

s/ William P. Doney
William P. Doney
VANCE & DONEY, P.A.
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APPENDIX C — APPELLANTS' MOTION FOR REHEARING AND/OR *EN BANC* REHEARING AND FOR CERTIFICATION DATED OCTOBER 26, 1998

IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 97-3525

ADVANTAGE WEST PALM BEACH, INC., BERT MOERINGS and MARSHA MOERINGS,

Appellants,

v.

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY,

Appellee.

APPELLANTS' MOTION FOR REHEARING AND/OR *EN BANC* REHEARING AND FOR CERTIFICATION

Appellants Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings (collectively Advantage), move the Court to grant rehearing and/or *en banc* rehearing of its decision issued in this cause on October 14, 1998, pursuant to Rules 9.330 and 9.331 of the Florida Rules of Appellate Procedure. Alternatively, Advantage requests the Court to certify its decision to the Supreme Court of Florida, pursuant to Article V, Section 3(b)(4) of the Florida Constitution and Rule 9.330(a) of the Florida Rules of

Appellate Procedure, as passing upon a question of great public importance.

MOTION FOR REHEARING

1. The Court recognized that Advantage was the owner of development rights under a development order issued by the City of West Palm Beach (the City) for a Development of Regional Impact (DRI). The Court, however, upheld the trial court's ruling that Advantage's development rights "do not exist separate and apart from the underlying realty," ruling that "[t]he DRI did not create a species of property known as transferable development rights." *Advantage West Palm Beach, Inc. v. West Palm Beach Community Redevelopment Agency, Inc.*, Case No. 97-3525 (Fla. 4th DCA Oct. 14, 1998).[1]

2. In so ruling, the Court failed to consider the nature of the City's development order. That development order established the DRI on approximately 77 acres of land within the City's boundaries. Advantage Exhibit (Adv.Ex.) 1. The development order conferred upon the developer of the DRI the right "to construct 3.7 million square feet of office space, 190,000 square feet of retail, 800 hotel rooms, and 1,000 dwelling units" on the property within the boundaries of the DRI. *Id.* at 104. The development rights conferred by the DRI *are not tied to any particular parcel of land* within the DRI. *Id.* at 52-60. Rather, upon deciding to use the development rights conferred by the DRI on a

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1. A copy of the court's October 14, 1998 opinion is attached to this motion.

particular parcel of land within the DRI, the developer was required to seek the City's approval for the use of the selected portion of the development rights on the particular parcel. *Id.* at 20. The development order authorized the developer to allocate or assign the development rights to property owners within the DRI. *Id.* at 4-7, 20.

3. Further, the Court overlooked the express provision of the development order from which arises the developer's authority to transfer the rights conferred thereby: "This Development Order shall be binding upon and inure to the benefit of the Developer *and its assigns or successors in interest* . . . ." (Adv.Ex.1 at 25) (emphasis supplied). The record reflects, without dispute, that the original developer of the Downtown Uptown DRI invoked the quoted clause to assign development rights to Advantage. See Initial Brief at 7-10. The record further reflects, again without contradiction, that Advantage thereafter assigned — for monetary consideration — these development rights to other entities, with the City's full knowledge and consent. *Id.* at 11-13. Indeed, the City expressly allowed one purchaser of Advantage's development rights to go forward with its project only *because* development rights had been obtained from Advantage. *Id.* at 10-11.

4. Thus, the record reflects that the development rights created by the DRI development order were *in fact* purchased and sold, *i.e.*, those development rights were treated in the marketplace as *having value*. This Court's ruling that "[n]either the language of the DRI nor the development process contemplated by the ordinance, support the conclusion that transferable development rights

were created" by the development order overlooks or fails to consider the *undisputed* evidence that the development rights created by the DRI development order were treated by all concerned as valuable rights.

MOTION FOR REHEARING *EN BANC*

5. Advantage incorporates ¶¶ 1-4, *supra*, into its request for an *en banc* rehearing in this case.

6. Advantage was the owner of development rights in the Downtown Uptown DRI. When the appellee West Palm Beach Community Redevelopment Agency (CRA) brought its action for eminent domain, the CRA sought a condemnation of real property within the DRI, as well as "any and all *rights of development* appertaining to said property pursuant to City of West Palm Beach Ordinance No. 2268-89," the ordinance that created the DRI. (R:3) (emphasis supplied). The trial court nonetheless ruled that the DRI did not create development rights and that those " 'rights' did not exist to be transferred or assigned." (R:2508-09). The panel opinion upholds this ruling as follows:

> We agree with the final judgment entered by the trial court. The DRI did not create a species of property known as transferable development rights. Unlike Palm Beach County, the City of West Palm Beach has never adopted a Transfer of Development Rights Ordinance. Neither the language of the DRI, nor the development process contemplated by the ordinance, support

> the conclusion that transferable development rights were created for which appellants are entitled to be compensated . . . .

Advantage West Palm Beach, supra.

7. This ruling presents an important public policy question that warrants *en banc* review by the full Court. The panel decision plainly states that the existence of an enactment controlling the transfers of development rights (TDRs) is a prerequisite to a *compensable* taking of so-called "floating" development rights. That is, in the absence of a TDR enactment, the panel opinion means that a governmental body may take development rights without compensation to the owner thereof if such rights have been assigned, sold, or transferred separately from a parcel of land.

8. The panel's analysis is without any support in Florida law; indeed, *no authority* is cited in the panel's opinion for this proposition. Moreover, the entire construct upon which the panel's decision rests is fundamentally flawed: it is *not* that development rights are severable *because* a particular governmental body has enacted a TDR ordinance, but that TDRs are allowable *because development rights are inherently severable from real property.*

9. As this Court has recognized, a TDR allows for "development rights, attributable to one piece of land, to be transferred to another." *City of Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332, 1337 (Fla. 4th DCA), *review denied*,

441 So. 2d 632 (Fla. 1983). The viability of TDRs thus turns *entirely* on the inherent severability of development rights:

> Land may be viewed as an assemblage or bundle of rights. According to TDR theory, the right to develop one's property may be severed from the land and sold, much in the same way as mineral rights are severed and sold . . . .

Wilkinson v. St. Jude Harbors, Inc., 570 So. 2d 1332, 1333 (Fla. 2d DCA), *review denied*, 576 So. 2d 295 (Fla. 1990). TDRs "are premised on the notion that development rights in land "are themselves distinct property entities" and, as such, "are *freely separated* from conventional rights of ownership." Judith W. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C.L. REV. 957, 1002 n.265 (1987) (citation omitted; emphasis supplied).

10. The expert testimony before the trial court in this case is entirely consistent with the governing legal principles. Dr. Nicholas, the expert witness called by Advantage at trial, explained that there are "two different types of transfer of development rights": "the formal recognized transfer . . . of development rights," or TDRs; and "the informal transfer" between private property owners. (T:167). As Dr. Nicholas explained, it is generally contemplated that the developer of a DRI will use informal transfer methods to sell development rights separate and apart from the real property witnin the DRI boundaries.

(T:179-80). Thus, while TDR ordinances *regulate* the transfer of development rights, it is the inherent severability of development rights that allows for TDRs in the first instance — *not* that the existence of a TDR ordinance somehow is the prerequisite to the existence of severable development rights.

11. Indeed, the analysis used by the panel opinion to defeat Advantage's claim is at odds with the very nature of property in American law:

> [T]itle to real estate is not a unitary or monolithic right. Instead, it is a right that may be compared to a bundle of individual rights, *each of which may be separated from the others and transferred to someone else,* thus leaving the original owner with all other rights of ownership. There is nothing new in this concept . . . we have long separated such components of title as mineral rights and mortgage liens. One of the components of this bundle of rights could, therefore, be *the right to develop the land.*

MARTIN A. GARRET, JR., LAND USE REGULATION: THE IMPACTS OF ALTERNATIVE LAND USE RIGHTS 76 (1987) (citation omitted; emphasis supplied). Indeed, "other than in most agricultural and mining areas, the right to develop *is probably the component of greatest value among the rights to ownership.*" *Id.* (emphasis supplied).

12. The United States Supreme Court has expressly recognized that the right to develop is included in the

"bundle of rights" that constitutes property subject to the Takings Clause. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1019 n.8 (1992) ("our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land"); *Nollan v. California Coastal Commission,* 483 U.S. 825, 833 n.2 (1987) ("[t]he right to build on one's own property . . . cannot remotely be described as a 'governmental benefit' "). In so ruling, the Supreme Court also acknowledged the *severability* of property rights in its *Nollan* decision. The Court struck down a condition that had been imposed on the landowner's right to develop his beachfront property, which condition required a dedication of a right of public access through the property. The Court construed the mandatory easement as having taken a separate right. 483 U.S. at 831 ("[t]o say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a *property interest* but rather . . . 'a mere restriction on its use' is to use words in a manner that deprives them of all their ordinary meaning"). So it is in eminent domain cases that the word "property" is used to "describe corporeal object which is the subject of ownership, *as well as the aggregate rights which an owner possess in or with respect to such a corporeal object.*" JULIUS L. SACKMAN, 2 NICHOLS' LAW OF EMINENT DOMAIN § 5.01[1] (3d ed. 1995) (footnotes omitted). Florida eminent domain law incorporates these fundamental principles. *E.g., Vatalaro v. Department of Environmental Regulation,* 601 So. 2d 1223, 1228 n.6 (Fla. 5th DCA), *review denied,* 613 So. 2d 3 (Fla. 1992); *Pinellas County v. Brown,* 450 So. 2d 240, 242 (Fla. 2d DCA 1984).

13. The panel's imposition of a requirement that a particular governmental unit have enacted a TDR ordinance

as a predicate to ascribing value to severed development rights is thus truly unprecedented and utterly inconsistent with the fundamental definitions of "property" under takings jurisprudence. Because the opinion's potential impact on commercial real estate transactions is both broad and far-reaching, Advantage submits that reconsideration of the panel's decision by the full Court is warranted.

REQUIRED STATEMENT FOR *EN BANC* REHEARING

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

s/ Alan T. Dimond
Alan T. Dimond

MOTION FOR CERTIFICATION

14. Advantage adopts the matters set forth in ¶¶ 1-13, *supra*.

15. The issue addressed by the panel opinion, *i.e.*, whether development rights created by a DRI development order are compensable, presents substantial questions of property law and constitutional principle. Moreover, the DRI process is a key element of this state's scheme for land-use planning and development. It is critical that all participants in the process, from both the private and public sector, have a definitive understanding of their rights and obligations. Indeed, because the process of applying for and

securing DRI approval is both lengthy and very expensive (as the record of this case illustrates), it is particularly critical that those who invest the time and money in that process have a clear understanding of the rights that are conferred by a DRI development order.

16. The panel's opinion will foster widely divergent treatment of development rights in eminent domain and inverse condemnation proceedings. In those counties and municipalities in which TDR ordinances have been adopted, the panel's opinion can be cited in support of ascribing compensable value to "floating" development rights. On the other hand, the panel's opinion certainly will be read to *deny* any compensation for takings of "floating" development rights in counties and municipalities which have not adopted TDR ordinances. Such disparate treatment of identical rights warrants consideration by the Florida Supreme Court.

17. Finally, the ruling that "floating" development rights have compensable value only when there is a governing TDR ordinance may well encourage counties and municipalities to repeal such ordinances, in the hope of being able to take such development rights without having to pay monies from public coffers. The tremendous social and environmental value of TDRs, both as a land-use control mechanism and to protect sensitive environmental areas without undue hardship to landowners or local governments, could well be sacrificed as a result of the panel's decision.

18. Accordingly, should this Court deny rehearing and/or rehearing *en banc*, Advantage submits that this case

should appropriately be certified for discretionary review by the Florida Supreme Court.

CONCLUSION

Based on the foregoing, Advantage requests the Court to grant rehearing and/or *en banc* rehearing, and/or to certify its decision to the Florida Supreme Court as passing upon a question of great public importance.

Respectfully submitted,

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By: s/ Alan T. Dimond
Alan T. Dimond

Appendix C

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion for rehearing and/or *en banc* hearing and for certification was mailed on October 26, 1998 to all parties named on the attached service list.

s/ Alan T. Dimond

APPENDIX D — OPINION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOR THE FOURTH DISTRICT DATED AND FILED OCTOBER 14, 1998

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT JULY TERM 1998

ADVANTAGE WEST PALM BEACH, INC., BERT MOERINGS, and MARSHA MOERINGS,

Appellants,

v.

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, INC.,

Appellee.

CASE NO. 97-3525

Opinion filed October 14, 1998

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Edward Fine, Judge; L.T. Case No. CL 96-5381 AI.

* * *

Appendix D

PER CURIAM.

The issue in this case is whether appellants are entitled to compensation for certain "development rights" as part of a taking in eminent domain. Appellants contended that these development rights were created by City of West Palm Beach Ordinance No. 2268-89, as amended, referred to as the Downtown Uptown Development of Regional Impact ("DRI"). After a three-day trial on this issue, the trial court entered a concise, well reasoned final judgement which held:

> The development rights in question have no value. They were not created by the enactment of the DRI. They do not exist separate and apart from the underlying realty. They were not severable from the realty.
>
> Neither the City nor the Community Redevelopment Agency is estopped in any way from contesting the assignability or value of the subject development rights assigned to Advantage.
>
> These "rights" did not exist to be transferred or assigned.
>
> [Appellants], Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings hold no separate, compensable property interest known as development rights, are due no compensation from the West Palm Beach Community Redevelopment Agency and hold no

apportionment claim against the owners of land within the DRI.

We agree with the final judgment entered by the trial court. The DRI did not create a species of property known as transferrable development rights. Unlike Palm Beach County, the City of West Palm Beach has never adopted a Transfer of Development Rights Ordinance. Neither the language of the DRI, nor the development process contemplated by the ordinance, support the conclusion that transferrable development rights were created for which appellants are entitled to be compensated. The opaque references by the City's attorney during a closing argument in a different case did not give rise to an estoppel against inconsistent positions. This is not the rare and exceptional case that justifies the application of the doctrine of equitable estoppel. *See State Dep't of Revenue v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981).

AFFIRMED.

POLEN, GROSS and TAYLOR, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

APPENDIX E — JUDGMENT REGARDING DEVELOPMENT RIGHTS OF THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA DATED SEPTEMBER 22, 1997

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CL 96-5381 AI

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY,

Plaintiff,

vs.

ADVANTAGE WEST PALM BEACH, INC., et al.,

Defendants.

JUDGMENT REGARDING DEVELOPMENT RIGHTS

This cause came before the Court pursuant to a non-jury trial conducted on August 18, 19 and 25, 1997. The purpose of the trial was to resolve whether development rights created pursuant to City of West Palm Beach Ordinance No. 2268-89, and the amendments thereto (i.e., City of West Palm Beach Ordinance Nos. 2287-89 and 2313-89), regarding the Downtown Uptown Development of Regional Impact (the "DRI"), constitute a type of property interest, apart from the realty within the DRI, with respect to

which Petitioner, the West Palm Beach Community Redevelopment Agency ("Petitioner"), is required to provide "full compensation" under Article X of the Florida Constitution.

On or about January 6, 1997, the Court entered an Agreed Order of Taking whereby Petitioner obtained title to certain real property belonging to: Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings (collectively, Advantage), along with "all development, contract and other rights held, or allegedly held, by Defendant, Advantage West Palm Beach . . ." pursuant to Florida Statutes Chapter 74. (Order of Taking, ¶5, pp. 8-9). On or about March 26, 1997, the City filed a motion *in limine* wherein it asserted that "numerous issues exist in this cause as to the validity and effect, if any, of the . . . purported assignments of development rights" to Advantage. (Pet.'s Mot., p.3). The City's motion further asserted that "as a matter of law" the Court is required to determine prior to the trial of this case:

A. Whether the so-called development rights could have been severed from the underlying real estate within the DRI;

B. Whether development rights are a species of property which may exist independent of any real property when all of the real property has been transferred to others;

C. Whether the purported assignments of development rights were and continue to be valid; and

D. Whether the parties must value the so-called development rights as severed from the realty and compensate Defendant, Advantage West Palm Beach, therefore.

(Pet.'s Mot., ¶ 8, pp. 3-4).

In response to Petitioner's motion *in limine*, Advantage asserted a series of fundamental procedural and substantive objections contending that Petitioner was attempting by its motion *in limine* to thrust wrongfully upon Advantage a trial under the guise of a motion *in limine* without the basic notice (or discovery) required by the Florida Rules of Civil Procedure. At the May 20, 1997 hearing on Petitioner's motion *in limine*, the Court acknowledged the propriety of Advantage's objections and determined that a properly noticed trial on the matters raised by Petitioner's motion was necessary. The Court allowed sufficient time for discovery and preparations to be completed.

Land regulation constitutes an exercise of the police power of government. The development order in this case restricts the use of private property. In this instance the development order authorized certain densities for both commercial and residential use. The development order did not actually place specific densities on specific properties but, with the exceptions of Blocks 3 and 10 which were close to a residential area, it merely allocated total densities for the area in general. Any developer of the property within the DRI would still have to obtain site plan approval for any specific land development contemplated.

Appendix E

Prior to the mortgaging of any of the property in question the development order was enacted as a municipal ordinance and was a matter of public record. The development order does not contain the term "development rights". It does not address development rights at all. It does not make any provisions for the transfer of development rights or for their severance or separation from the underlying real estate. The City of West Palm Beach has never adopted an ordinance permitting or regulating the transfer of development rights.

Shortly after the adoption of the development order in March 1989, the original developer entered into several mortgage transactions. Every one of these mortgage transactions pledged fee simple title as security for these loans. Thereafter the project became financially troubled. Ultimately the mortgages were foreclosed. All title presently held by all the interested land owners was acquired by these mortgage foreclosures or by subsequent purchase of title acquired by means of these mortgage foreclosures.

After the passage of the development order, and after execution of the mortgages but before the mortgages were foreclosed, the original owners of the property conveyed the development rights which are the subject of this Judgment, to Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings. Defendants own about 5% of the land within the DRI but they claim to own approximately 90% of all development rights.

Advantage claims that the City has acknowledged in their dealings with land owners that these rights have value

by requiring that owners obtain development rights from Advantage or litigate the matter. Advantage sold development rights to Babcock's Economy Furniture Stores, Inc., a land owner within the DRI that was in the process of obtaining approval for the construction of a large office building. The Court finds that the City has not recognized any development rights but instead recognized that the claim that development rights existed clouded the land titles within the DRI so that the parties were obligated to either litigate the matter or reach an agreement with Advantage since either action resolved the title issue.

First Union Bank by a related entity known as O.R.E.O., Inc. acquired 50,000 square feet of development rights from Advantage. This was acquired as part of a settlement that involved the City, First Union and Advantage. Again since the validity of the claim of Advantage was undetermined, either O.R.E.O, Inc. would have to undertake its own litigation to obtain a judicial determination, or satisfy Advantage so that there could be no potential claim by Advantage.

The City's position in the litigation of the Okeechobee corridor was that if the parcels in question were owned by one entity, its development rights could be placed on the various parcels according to the owner's discretion, provided that development did not exceed the maximum allowed by the DRI. This is not inconsistent with the City's present position. Consequently, there is no estoppel operating against the City.

The assignments of development rights were acquired without the consent of any of the mortgage holders, and

without the consent of the City of West Palm Beach. Many of the assignments were unrecorded and would not surface in a normal title examination. If these development rights in fact remove the right of an owner to develop property then Advantage without purchasing any of the land in question would be in a position to prohibit the owners from the development of their land.

The Court finds that the prior unitary owners within the DRI having pledged fee simple title to their mortgagees, could not strip off development rights. Development rights were not separate intangibles created by the passage of the DRI.

CONCLUSIONS OF LAW:

The development rights in question have no value. They were not created by the enactment of the DRI. They do not exist separate and apart from the underlying realty. They were not severable from the realty.

Neither the City nor the Community Redevelopment Agency is estopped in any way from contesting the assignability or value of the subject development rights assigned to Advantage.

These "rights" did not exist to be transferred or assigned.

Defendants, Advantage West Palm Beach, Inc., Bert Moerings and Marsha Moerings hold no separate, compensable property interest known as development rights,

are due no compensation from the West Palm Beach Community Redevelopment Agency and hold no apportionment claim against the owners of land within the DRI.

ORDERED AND ADJUDGED at West Palm Beach, Florida, this 22 day of September, 1997.

s/ Edward Fine
EDWARD FINE
Circuit Judge

APPENDIX F — AGREED ORDER OF TAKING OF THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY DATED MARCH 6, 1997

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY.

CASE NO. CL 96-5381 AI

Parcels 701, 707, 709, 6904, RB-1, RB-2, RB-4,
RB-5, RB-6 and Claims to Development and
Other Rights Under DRI

WEST PALM BEACH COMMUNITY
REDEVELOPMENT AGENCY,

Petitioner,

vs.

ADVANTAGE WEST PALM BEACH, INC., et al.,

Respondents.

AGREED ORDER OF TAKING

THIS CAUSE came before the Court under the Petition in Eminent Domain, Amendment to Petition in Eminent Domain and Answer with Affirmative Defenses filed by Defendant, ADVANTAGE WEST PALM BEACH, INC., BERT MOERINGS and MARSHA MOERINGS, (hereinafter collectively referred to as ADVANTAGE

Appendix F

WEST PALM BEACH), and it appearing that proper notice was first given to all the Defendants and to all persons having or claiming any equity, lien, title or other interest in or to the property described herein that the Petitioner would apply to this Court for an Order of Taking and upon agreement of Petitioner and Defendant, ADVANTAGE WEST PALM BEACH, and the Court being fully advised in the premises, upon consideration, it is, therefore,

ADJUDGED:

1. That the Court has jurisdiction of the subject matter of and the parties to this cause;

2. That the pleadings in this cause are sufficient, and the Petitioner is properly exercising its delegated authority;

3. That each Estimate of Value filed in this cause by the Petitioner was made in good faith and based upon a valid appraisal;

4. That upon the payment of the deposit hereinafter specified into the Registry of this Court, fee simple title shall vest in the Petitioner in the following properties:

Parcel 701

Legal Description — Lots 1, 2, 3, 4, 5, and 6, Block 7, AN AMENDED PLAT OF PALM BEACH HEIGHTS ADDITION TO WEST PALM BEACH, according to the Plat thereof on file in the Office of the Clerk of the Circuit Court in and for Palm

Appendix F

Beach County, Florida, recorded in Plat Book 2, page 74.

Parcel 707

Legal Description — Lots 7 and 8, Block 7, AN AMENDED PLAT OF PALM BEACH HEIGHTS ADDITION TO WEST PALM BEACH, according to the Plat thereof on file in the Office of the Clerk of the Circuit Court in and for Palm Beach County, Florida, recorded in Plat Book 2, page 74.

Parcel 709

Legal Description — Lots 9 and 10, Block 7, AN AMENDED PLAT OF PALM BEACH HEIGHTS ADDITION TO WEST PALM BEACH, according to the Plat thereof on file in the Office of the Clerk of the Circuit Court in and for Palm Beach County, Florida, recorded in Plat Book 2, page 74.

Parcel 6904

Legal Description — Lot 4 and the north one-half of Lot 5, Block 69, PLAT OF ADDITION TO WEST PALM BEACH FOR THE HIGHLAND PARK LAND COMPANY, according to the plat thereof on file in the Office of the Clerk of the Circuit Court in and for Palm Beach County, Florida, recorded in Plat Book 1, page 122.

Roadbed Parcels RB-1, RB-2, RB-4, RB-5 and RB-6 as attached.

ADVANTAGE WEST PALM BEACH represents and warrants that it is the fee simple owner of each of the above-described properties and that there is in existence no contract, option, lease or other agreement with any third party concerning the purchase, sale, lease, or encumbrance of the same.

5. That a dispute exists between the parties hereto as to the ownership, validity and value, if any, of certain development rights, contract rights and other rights allegedly owned by Defendant, ADVANTAGE WEST PALM BEACH, pursuant to the Downtown/Uptown Development of Regional Impact as adopted by City of West Palm Beach Ordinance No. 2268-89, as amended, and as more fully set forth by ADVANTAGE WEST PALM BEACH in its Answer filed herein. It is agreed that upon payment of the total sum of money set forth in Paragraph 7 below that full and complete title to all development, contract and other rights held, or allegedly held, by Defendant, ADVANTAGE WEST PALM BEACH, pursuant to the development of regional impact, as amended, shall vest in Petitioner, including but not limited to, all rights allegedly held by Defendant, ADVANTAGE WEST PALM BEACH, pursuant to the following:

A. Absolute Assignment of Development Rights as recorded in Official Record Book 8557, page 267 of the Public Records of Palm Beach County, Florida.

B. Absolute Assignment of Development Rights as recorded in Official Record Book 8557, page

269 of the Public Records of Palm Beach County, Florida.

C. Assignment of Contract Rights as recorded in Official Record Book 9261, page 367 of the Public Records of Palm Beach County, Florida.

D. First Amendment Assignment of Contract Rights and Clarification of December 22, 1994 Assignment of Contract Rights as recorded in Official Record Book 9261, page 431 of the Public Records of Palm Beach County, Florida.

E. Certificate of Title as recorded in Official Record Book 9302, page 1824 of the Public Records of Palm Beach County, Florida.

F. Absolute Assignment of Development Rights as recorded in Official Record Book 9308, page 1420 of the Public Records of Palm Beach County, Florida.

G. Any and all rights and all rights and property interests, if any, pursuant to an unrecorded Quit Claim Deed from Donald F. Mintmire, Trustee dated December 23, 1994.

H. Any and all rights, if any, of ADVANTAGE WEST PALM BEACH, to all alleged impact fee waiver as described in Paragraph 7 (B)(7) of Defendants' Answer herein.

Appendix F

By stipulating to this Agreed Order of Taking, Defendant, ADVANTAGE WEST PALM BEACH, specifically does not waive any right to full or just compensation for real property, development rights, contract rights or other rights subject to or impacted by this eminent domain proceeding as may later be determined by the Court or a jury herein with respect to any properties that are or are not included in this eminent domain proceeding but are located within the boundaries of the downtown/uptown development of regional impact. Further, by stipulating to this Agreed Order of Taking, Petitioner does not waive any right to argue or contend that Defendant is not the lawful owner of said rights, that said rights were not validly assigned, that said rights have no value or any other defense that may be asserted by Petitioner to the same. It is the express intention of Petitioner and ADVANTAGE WEST PALM BEACH that upon compliance with the terms of this Order, all ownership, right, title or interest of ADVANTAGE WEST PALM BEACH in real property or property of any nature, including but not limited to development rights, located within the Downtown/Uptown development of regional impact or otherwise related or pertaining to said development shall vest in Petitioner and Defendant shall in the future assert no claim to the same.

6. That the deposit of money will secure the persons lawfully entitled to the compensation which will be ultimately determined by final judgment of this Court;

7. That the sum of money to be deposited in the Registry of the Court within twenty (20) days of the entry of this Order, shall be in the amount of:

Parcel 701	$ 206,000.00
Parcel 707	91,000.00
Parcel 709	93,000.00
Parcel 6904	82,000.00
Parcel RB 1	480,500.00
Parcel RB 2	338,500.00
Parcel RB 4	144,000.00
Parcel RB 5	291,000.00
Parcel RB 6	185,000.00
TOTAL	$ 1,911,000.00

8. That on deposit as set forth above and without further notice or Order of this Court, the Petitioner shall be entitled to possession of the property as described herein.

9. Petitioner and Defendant, CITY OF WEST PALM BEACH, shall not object to the withdrawal of funds to be deposited in accordance with this Order provided payment is made of all current and back taxes. Petitioner and Defendant, CITY OF WEST PALM BEACH, waive any rights they may have against ADVANTAGE WEST PALM BEACH regarding Code Enforcement Liens on the property described herein.

DONE AND ORDERED this 6 day of March, 1997, in the State of Florida, County of Palm Beach.

s/ [illegible]
Circuit Judge

APPENDIX G — ORDINANCE NO. 2268-89 OF THE CITY OF WEST PALM BEACH, FLORIDA DATED MARCH 20, 1989

ORDINANCE NO. 2268-89

AN ORDINANCE OF THE CITY COMMISSION OF THE CITY OF WEST PALM BEACH, FLORIDA, RELATING TO A DEVELOPMENT OF REGIONAL IMPACT KNOWN AS "DOWNTOWN UPTOWN;" MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW PERTAINING TO DOWNTOWN UPTOWN, ESTABLISHING DEVELOPMENT LIMITATIONS, RESTRICTIONS AND CONDITIONS RELATING TO APPLICATIONS, COMMENCEMENT, AIR, HISTORIC AND ARCHEOLOGICAL SITES, HABITAT, VEGETATION AND WILDLIFE, DRAINAGE, WATER SUPPLY: POTABLE AND NON-POTABLE WATER, HAZARDOUS MATERIALS AND WASTE, WASTEWATER, EDUCATION, POLICE , AND PUBLIC SAFETY, FIRE PROTECTION, ENERGY, TRANSPORTATION, HOUSING, CONVERSION OF USES, SITE PLAN REVIEW, LAND USE DISTRIBUTION, DEMOLITION OF EXISTING STRUCTURES, SUBDIVISION OF LAND, RIGHT-OF-WAY ABANDONMENT, LANDSCAPING AND TREE PROTECTION, DESIGN REQUIREMENTS, PARKS AND CAPITAL FACILITIES CONSTITUTING THIS ORDINANCE AS A DEVELOPMENT ORDER BY THE CITY OF WEST PALM BEACH IN COMPLIANCE WITH LAW; PROVIDING AN EFFECTIVE DATE; PROVIDING A TERMINATION DATE; AND FOR OTHER PURPOSES.

* * *

Appendix G

WHEREAS, an Application for Development Approval for the Downtown Uptown Development of Regional Impact, known as "Downtown Uptown," was originally submitted to the City of West Palm Beach and the Treasure Coast Regional Planning Council on March 21, 1988, and was supplemented with additional information submitted August 30, 1988, November 4, 1988 and January 4, 1989, in accordance with Section 389.96, Florida Statues; and

WHEREAS, the applicant, Downtown Uptown Venture, through its authorized agent, James R. Brindell, Esquire, proposes to construct 3.7 million square feet of office space, 190,000 square feet of retail, 800 hotel rooms, and 1,000 dwelling units, constituting a Development of Regional Impact on 76.90 acres of property legally described in Exhibit "A," attached hereto, and located in the City of West Palm Beach, Florida; and

WHEREAS, the DOWNTOWN UPTOWN JOINT VENTURE has filed with the CITY OF WEST PALM BEACH an Application for Development Approval of a Development of Regional Impact under the provisions of Section 380.06, Florida Statutes; and

WHEREAS, the public notice requirements of the City of West Palm Beach and Section 380.07(11), Florida Statutes, have been satisfied and notice has been given to the Florida Department of Community Affairs, Treasure Coast Regional Planning Council, Florida Department of Environmental Regulation, and the South Florida Water Management District; and

Appendix G

WHEREAS, the City and the Treasure Coast Regional Planning Council have considered the application, as submitted and as subsequently supplemented, and found it to be in compliance with applicable law; and

WHEREAS, the City Commission, on March 6, 1989, held a duly noticed public hearing on the Development of Regional Impact Application for Development Approval, and has heard and considered the testimony taken thereat and the reports, recommendations, exhibits, and other documentary evidence submitted at the public hearing; and

WHEREAS, the City Commission has received and considered the report and recommendations of the Treasure Coast Regional Planning Council; and

WHEREAS, the City Commission has made the findings of fact and conclusions of law hereinafter set forth with regard to the Application for Development Approval and has entered the following order; and

WHEREAS, the City, having considered all of the foregoing and being fully advised and informed in the premises, has determined that it is in the best interests of the citizens of West Palm Beach to approve a Development Order for the property which is the subject of the aforementioned Application for Development Approval, subject to specified conditions and limitations.

Now THEREFORE, BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF WEST PALM BEACH, FLORIDA, that:

Appendix G

SECTION 1: The City Commission hereby makes the following FINDINGS OF FACT:

1. The DOWNTOWN UPTOWN JOINT VENTURE (the "Developer") has filed with the CITY OF WEST PALM BEACH, FLORIDA (the "City") an Application for Development Approval for a Development of Regional Impact ("Downtown Uptown DRI Application for Development Approval") pursuant to provisions and requirements of Section 380.06, Florida Statutes.

2. Copies of the Downtown Uptown DRI application for development approval were sent to the TREASURE COAST REGIONAL PLANNING COUNCIL ("TCRPC") and the DEPARTMENT OF COMMUNITY AFFAIRS OF THE STATE OF FLORIDA ("DCA") pursuant to Section 380.06(10)(a), Florida Statutes, on July 17, 1987.

3. On April 19, 1988, September 27, 1988 and December 1, 1988, the TCRPC requested additional information in writing from the Developer and additional information was filed on August 30, 1988, November 4, 1988, and January 4, 1989.

4. The Downtown Uptown DRI application for development approval, as supplemented, seeks development approval for approximately 78 acres of real property (hereinafter "Downtown Uptown") which is legally described in Exhibit A, attached hereto and incorporated herein.

Appendix G

5. The City has given notice that a proposed development is undergoing development of regional impact review.

6. The City has given notice and held a public hearing to consider the Downtown Uptown DRI application for development approval in accordance with Section 380.06(11) and the Zoning Code of the City.

7. On February 13, 1989, TCRPC submitted its report and recommendation on the regional impact of the proposed DRI.

8. The proposed development is not in an Area of Critical State Concern, designated pursuant to the provisions of Section 380.06, Florida Statutes.

9. As long as the developer complies with the conditions of approval contained in this Development Order, the development of Downtown Uptown, in accordance with the Downtown Uptown DRI application for development approval, does not unreasonably interfere with the achievement of the objectives of the State Land Development Plan.

10. As long as the developer complies with the conditions of approval contained in this Development Order, the development of Downtown Uptown, in accordance with the Downtown Uptown DRI application for development approval is consistent with the City's comprehensive plan, as amended, and land development regulations proposed to be adopted simultaneously with this Development Order.

Appendix G

11. As long as the developer complies with the conditions of approval contained in this Development Order, the development of Downtown Uptown, in accordance with the Downtown Uptown DRI application for development approval, is consistent with the report and recommendations of the Treasure Coast Regional Planning Council submitted pursuant to Section 380.07 (12). Florida Statutes, in that:

    A. Negative impacts of environmental, natural and historical resources are expected to be minimal and these impacts will be mitigated by compliance with the conditions of approval.

    B. The Downtown Uptown development will have a positive impact on the economy of the region.

    C. There are adequate public facilities available or planned and funded to serve the development of Downtown Uptown in a safe and efficient manner, provided that such development is carried out in accordance with each and every condition and limitation of this Development Order.

    D. Based on the transportation conditions of approval, Phase I of the Downtown Uptown development will efficiently use transportation facilities. Development beyond Phase I is contingent on the transportation and transportation-related impacts being addressed either through the substantial deviation process or as part of the City's Areawide Development of Regional Impact.

E. Based on the housing conditions of approval, the Downtown Uptown development will favorably affect the ability of people to find adequate housing reasonably accessible to their places of employment.

F. The demand on energy resources has been reduced through the conditions of approval.

SECTION 2: The City Commission hereby makes the following CONCLUSIONS OF LAW:

After having considered the Downtown Uptown DRI application for development approval, the report and recommendations of the TCRPC, the recommendations of the CITY's own professional staff, the opinion, advice and counsel of the public, and based on the above Findings of Fact, the City Commission of the CITY hereby concludes that:

1. As long as the developer complies with the conditions of approval contained in this development order, the development of the Downtown Uptown DRI Application for Development Approval complies with the requirements of Section 380.06(12), Florida Statutes.

2. As long as the developer complies with the conditions of approval contained in this development order, the development of the Downtown Uptown DRI application for

development approval complies with the requirements of Section 380.06(14) in that:

A. The development proposed in the Downtown Uptown DRI application for development approval will not unreasonably interfere with achievement of the objectives of the State Land Development Comprehensive plan;

B. The development proposed in the Downtown Uptown DRI application for development approval is consistent with the Comprehensive Plan of the City, as amended, and all applicable land development regulations as proposed to be adopted simultaneously with this Development Order; and

C. The development proposed in the Downtown uptown DRI application for development approval is consistent with the report and recommendations of the TCRPC.

3. This Development Order supersedes any and all other Development Orders issued by the City regarding Downtown Uptown pursuant to Section 380.06 or any other Authority.

4. The Downtown Uptown DRI application for development approval and this Development Order has been considered and approved in accordance with each and every applicable requirement of Section 380.06.

Appendix G

SECTION 3: IN ACCORDANCE WITH THE PROVISIONS OF SECTION 380-06, FLORIDA STATUTES (1987). THE CITY COMMISSION OF THE CITY OF WEST PALM BEACH DOES HEREBY GRANT THIS DEVELOPMENT ORDER APPROVING THE DOWNTOWN UPTOWN DEVELOPMENT OF REGIONAL IMPACT, SUBJECT TO THE CONDITIONS, RESTRICTIONS AND LIMITATIONS HEREINAFTER SET FORTH.

APPLICATION FOR DEVELOPMENT APPROVAL

1. The Downtown Uptown DRI application for development approval is incorporated herein by reference and relied upon by the parties in discharging their statutory duties under Chapter 380, Florida Statutes. For the purpose of this condition, the Application for Development Approval shall include the Application for Development Approval dated March 21, 1988; and the Supplemental information dated August 30, 1988, and November, 1988, and January 4, 1989.

2. The Downtown Uptown Development of Regional Impact (DRI) is approved, subject to further regional review as a substantial deviation or as part of the proposed City of West Palm Beach Areawide DRI for transportation and transportation-related issues, including the intensity / density of land uses in all phases of the Downtown Uptown DRI beyond Phase 1 (1,155,070 square feet of office, 96,255 square feet of retail, 400 hotel rooms, 425 dwelling units). Nothing

in this Development Order shall be deemed to grant the developer of the Downtown Uptown DRI any priority in regard to any future transportation service capacity which is made available to serve the proposed Areawide DRI for the City Center area of West Palm Beach at any time, including further regional review of phases of the Downtown Uptown DRI beyond Phase 1, except as set forth in the following subsections:

A. It is recognized that the scenario proposed for new development in the City Center ADRI (ADRI Scenario) of 7.414 million square feet of office, 478,300 square feet of retail, 1. 407 million square feet of institutional space, 1,970 hotel rooms, and 1,570 residential units is the minimum which the City and the County should strive to achieve in order to accomplish the many employment, residential and recreational objectives for the City Center as well as the enhancement of neighborhoods adjacent to the City Center and increased tax revenues for the benefit of all the taxpayers in the City of West Palm Beach.

B. The City, County and private sector shall make their best efforts to achieve the maximum development potential for the City Center. It is recognized that the major limiting factor is transportation. In that regard, those groups shall explore thoroughly all of the construction and transportation system management options in order to develop a transportation program which is the most cost-effective and which provides the greatest

opportunity to achieve the ADRI Scenario as a minimum.

Allocation

C. In the event that the ADRI Scenario or a larger development scenario is achievable from a transportation standpoint:

(1) Downtown Uptown shall be allocated its entire proposed development program for office and retail space of 3.89 million square feet (Base Program). The balance of the City Center shall be allocated the remainder of the available square footage (i.e., 4.0+ million square feet; Base Program) of office and retail space (non-institutional);

(2) In the event that more office and retail space (non-institutional) beyond the ADRI Scenario is achievable, then Downtown Uptown may apply to the City for City Commission approval to use some or all of that excess for a specific construction project of office and/or retail space, provided Downtown Uptown has constructed or has under construction or financing commitment all of its respective Base Program and the requested square feet are available for use pursuant to the ADRI transportation program.

D. If less than the ADRI Scenario is achievable as a result of transportation limitations (determined after the best efforts described in paragraph B above):

(1) Downtown Uptown shall be allocated the first 2.0 million square feet of office and retail space (non-institutional) achievable (Phase 1 included);

(2) the balance of the City Center shall be entitled to any remainder of the office and retail space (non-institutional) achievable up to the next 2.0 million square feet;

(3) the balance of any amount in excess of 4.0 million square feet of office and retail space (non-institutional), which is achievable, shall be divided on the basis of 50% to Downtown Uptown and 50% to the balance of the City Center;

(4) the amounts in (1) and (3) shall constitute Downtown Uptown's Reduced Base Program, and the amounts in (2) and (3) shall constitute the Reduced Base Program for the balance of the City Center;

(5) Downtown Uptown shall not be allocated a cumulative square footage of office and retail space in excess of 3.89 million square feet unless more than the ADRI Scenario is achievable from a transportation perspective. In that event, the excess shall be addressed on an ad hoc basis as described in paragraph C(2) above.

Utilization

E. (1) If 2.0 million square feet or less of office and retail space (non-institutional) is achievable under

the ADRI, then Downtown Uptown shall be entitled to utilize those square feet as follows:

(a) 500,000 square feet upon the requirements of Condition 30 being met;

(b) 750,000 square feet upon the requirements of Conditions 32 and 33 being met;

(c) The remaining 750,000 square feet may be utilized as they become available pursuant to the ADRI transportation program.

(2) If more than 2.0 million square feet of office and retail space (non-institutional) is achievable under the ADRI, but the required transportation improvements will occur in increments over several years thereby not making the total amount available for use at one time:

(a) Downtown Uptown shall be entitled to utilize:

1) 500,000 square feet, upon the requirements in Condition 30 being met;

2) 750,000 additional square feet, upon the requirements in Conditions 32 and 33 being met;

3) the remaining 750,000 square feet of the first 2.0 million square feet as it is

available for utilization pursuant to the ADRI transportation program. Provided, however, that a developer may apply to the City for approval to utilize for a specific office or retail project in the balance of the City Center a portion of this last 750,000 square feet, but only if the requested portion is not then available as part of the second 2.0 million square feet and only up to that amount of square feet over 2.0 million square feet which will be achievable under the ADRI minus any amounts previously permitted for utilization in the balance of the City Center under this subsection, and only after Downtown Uptown has been given written notice from the City that a specific project application has been submitted. If Downtown Uptown notifies the City within 60 days of receiving the notice that it will exercise its option to utilize the requested square footage, a site plan approval application must be filed within six months of the date Downtown Uptown notified the City of its intent to exercise its option. Downtown Uptown shall not be entitled to exercise its option unless it has constructed, has under construction, has a pending site plan application filed previous to receipt of the notice from the City, or has under financing commitment at least one million square feet of office or retail

space. Failure to submit the required site plan approval application within 6 months of the notification of the City and to commence construction within 12 months of said notification shall constitute a waiver of Downtown Uptown's option and the project proposed in the balance of the City Center may be authorized. Such authorization shall lapse if a complete site plan or other required application has not been filed with the City within 6 months of the authorization and construction commenced within 12 months of the authorization. An amount of square feet equal to any square feet authorized for utilization by a developer in the balance of the City Center under this subsection (2)(a) 3 shall be reallocated to Downtown Uptown from the second 2.0 million square feet of office and retail (non-institutional) space achievable under the ADRI. Downtown Uptown shall have a priority right to utilize any such reallocated square footage as it becomes available for use pursuant to the ADRI transportation program.

(b) Any allocation under subsection D (3) of this condition of square feet achievable under the ADRI in excess of 4.0 million square feet may be utilized by the recipients on a first-come, first-served

basis as the square feet become available for use pursuant to the ADRI transportation program.

(c) In the event that at least 4.0 million square feet of office and retail square footage (non-institutional) but less than that proposed in the ADRI Scenario is achievable from a transportation perspective, and Downtown Uptown utilizes its entire Reduced Base Program and additional square footage remains in the Reduced Base Program for the balance of the City Center and is available for use pursuant to the ADRI transportation program, Downtown Uptown shall be entitled to use that remaining portion of the Reduced Base Program for the City Center in excess of their 2.0 MSF for a specific construction project(s) in Downtown Uptown of additional commercial and/or retail space. Similarly, if the balance of the City Center has used their entire Reduced Base Program and Downtown Uptown has not used their entire Reduced Base Program, the balance of the City Center shall be entitled to use that portion of Downtown Uptown's remaining Reduced Base Program in excess of its 2.0 MSF which is available for use pursuant to the ADRI transportation program for a specific

construction project(s) in the balance of the City Center of office and/or retail space.

F. In all instances, the transportation capacity to serve the proposed courthouse expansion and State Attorney and Public Defender facility, up to a total of 1.2 MSF, shall be accommodated. The traffic generated by the first phase of the courthouse facilities (840,000 sq. ft.) is assumed to be part of the 25% background growth addressed in this traffic study for the Downtown Uptown DRI.

It is recognized for purposes of this development order that the courthouse facilities shall be considered institutional.

COMMENCEMENT OF DEVELOPMENT

3. Failure to either commence construction of two hundred and fifty thousand (250,000) square feet of office or retail development or let the contracts for the road improvements described in Conditions 32 and 33 within five (5) years from the effective date of this Development Order shall result in further development of regional impact review by the Treasure Coast Regional Planning Council and the City of West Palm Beach. Upon completion of review, the City may declare this Downtown Uptown Development Order null and void, and of no further force and effect. For the purposes of this Paragraph, commencement of construction shall mean payment of all fees required for the issuance of all required permits and the actual

construction of improvements above and beyond site improvements and foundations.

AIR

4. Clearing of specific building sites for demolition shall be followed by seeding and mulching of disturbed areas within 30 days of completion of clearing work on all the parcels. Parcels undergoing active construction activities shall remain landscaped except for those areas where construction activities are underway. All work shall be done in a manner satisfactory to the City of West Palm Beach. The sites shall be maintained in compliance with applicable City codes.

5. During land clearing and site preparation, wetting operations or other soil treatment techniques to control unconfined emissions shall be employed by individual developers. The Developer shall adhere to the requirements of an Unconfined Emissions Control Plan which has been approved by the City of West Palm Beach, in consultation with the Palm Beach County Health Department and the Department of Environmental Regulation of the State of Florida.

6. Prior to construction of more than 1,250,000 square feet of nonresidential space, 400 hotel rooms, and 425 residential dwelling units, an air quality monitoring program shall be developed and implemented within the Downtown Uptown area which is satisfactory to both the City of West Palm Beach and the Treasure Coast Regional Planning Council in consultation with

Florida Department of Environmental Regulation and Palm Beach County. After implementation of the program, a report regarding monitoring results shall be provided to Florida Department of Environmental Regulation, Treasure Coast Regional Planning Council, and Palm Beach County at least once annually through project build out.

HISTORIC AND ARCHEOLOGICAL SITES

7. In the event of discovery of any historical or archeological artifacts during project construction, the developer shall stop construction in that area and immediately notify the Division of Historical Resources in the Florida Department of State, the City of West Palm Beach, and Treasure Coast Regional Planning Council. A reasonable amount of time agreed upon by the developer and the Division of Historic Resources, not to exceed 90 days, shall be provided to examine the artifacts and to remove them if deemed appropriate by the Division.

8. Recommended treatment of seven structures within the boundaries of the project, as identified in the Application for Development Approval, shall follow the guidelines outlined by the Department of State Division of Historical Resources in letters dated April 20, 1988, and August 3, 1988, as incorporated in the Treasure Coast Regional Planning Council Assessment Report for Downtown Uptown. These steps include:

   A. Preservation on site with rehabilitation for adaptive reuse according to the Secretary of the Interior's

Standards for Rehabilitation. Rehabilitation plans and specifications shall be submitted to the Department of State Division of Historical Resources for certification that the Secretary's Standards have been met; or

B. Relocation to and preservation at another site; or

C. If preservation and/or relocation is not possible for reasons of documented structural deficiencies, other reasonable redevelopment considerations, or unreasonable costs, then each building shall be documented with photographs, floor plans and other criteria according to the Historic American Building Survey standards. Such documentation shall be prepared and submitted to the Department of State Division of Historical Resources prior to commencement of demolition.

D. As an option to preservation or relocation of a particular structure, excluding the United Methodist Church, the developer may replicate the significant exterior architectural features of the structure somewhere within the project. The developer shall maintain the United Methodist Church in such a manner that the physical condition of the structure shall be maintained until such time as adaptive reuse is undertaken. The City shall have the right to periodically inspect the structure and, if deemed necessary by the City, to make repairs and place a lien against the property for the cost of repairs necessary to properly preserve the structure.

Appendix G

HABITAT, VEGETATION, AND WILDLIFE

9. Prior to obtaining any certificate of occupancy for any structure located within a development parcel within the Downtown Uptown project site, all Melaleuca, Brazilian Pepper, and Australian Pine shall be removed from that parcel. Removal shall be in such a manner that avoids seed dispersal by any of these species. There shall be no planting of these species in the area of the Downtown Uptown Development of Regional Impact.

DRAINAGE

10. The storm water management system serving the entire Downtown Uptown Development of Regional Impact project area shall be designed and constructed to provide the level of treatment provided by a system designed to retain or detain with filtration, as a minimum, the first one inch of runoff or the runoff from a one-hour, three-year storm event, whichever is greater. Required retention volumes may be accommodated in a combination of exfiltration trenches, vegetated swales, dry retention areas, other suitable retention structures or other suitable methods agreed upon by the City of West Palm Beach. Under no circumstances shall post-development runoff volumes exceed predevelopment runoff volumes for a storm event of three-day duration and 25-year return frequency. Any discharge proposed to Lake Worth shall meet Department of Environmental Regulation standards for Class III Florida waters.

11. To reduce the possibility of clogging any exfiltration trenches and to improve water quality, the following

best management practices shall be followed by the developer:

A. All non-public curbed areas, parking, and road surfaces within the boundaries of the project area shall be swept as necessary, but in no case less frequently than once per week. Sweeping shall be accomplished by vacuum-type or vacuum regenerative-type sweepers.

B. Parking stops or bumps which may collect and concentrate contaminants, or which would interfere with efficient sweeping of parking areas, shall not be used on the project.

C. All newly-constructed catch basins shall include upturned elbows, baffles, oil skimmers and/or other pollution control devices considered appropriate by the South Florida Water Management District in consultation with the Department of Environmental Regulation to filter stormwater prior to entering culverts or any proposed exfiltration systems. These systems shall be cleaned as necessary in order to reduce any adverse impacts of stormwater runoff.

12. In order to reduce the possibility of saltwater intrusion, the stormwater management system shall be designed so that there is no reduction in the predevelopment wet or dry season water table at any location on the project site. Four (4) monitoring wells (two (2) on each side of the coastal ridge) shall be installed by the developer

according to the criteria and standards of the City Engineer. A water monitoring report shall be submitted to the City of West Palm Beach and to the Palm Beach County Health Department in the months of January and July of each year. United States Environmental Protection Agency Tests 601 and 602 shall be analyzed in each monitoring report.

WATER SUPPLY: POTABLE AND NON-POTABLE WATER

13. To the maximum extent possible, xeriscape landscaping shall be used on the project site. No less than 50 percent of all landscaped areas shall be comprised entirely of native or drought-tolerant plants adapted to soil and climatic conditions occurring on site. The use of soil improvement techniques to increase water absorption and the holding capacity of the soil, mulches to minimize evaporation, and the most water conservative irrigation systems available (tensionmeters, drip irrigation, and low angle irrigation heads, etc) shall be employed in an effort to minimize irrigation demand and waste.

14. A source of irrigation water used by this project shall be stormwater runoff, if reasonably practical. Supplemental supplies of irrigation water may be derived from on-site wells if such are permitted by South Florida Water Management District. Irrigation water may not be derived from municipal sources without providing evidence to the satisfaction of TCRPC, in consultation with the City of West Palm

Beach and South Florida Water Management District, that other preferred sources are not available and that all reasonable efforts consistent with provision of good landscaping and a beautiful urban environment have been implemented to reduce irrigation water demand.

15. All development and redevelopment in Downtown Uptown shall use water-saving plumbing fixtures, and other water conserving devices as specified in the Water Conservation Act, Section 553.14, Florida Statutes, to reduce water use.

16. Prior to the issuance of each building permit within the boundaries of the Downtown Uptown Development of Regional Impact, the developer shall provide evidence from the City of West Palm Beach Department of Utilities that adequate amounts of potable water will be available to serve the amount of development being permitted.

HAZARDOUS MATERIALS AND WASTE

17. Prior to demolition of any residential or commercial structures on site, a visual inspection of the interior of the structure and premises shall be undertaken for the purpose of detecting and safely removing any stored hazardous or toxic materials that may be present. Particular attention shall be given to commercial property where past or present storage seems likely (e.g., gas stations). Where storage tanks or hazardous or toxic materials are evidenced, removal and cleanup shall be provided to the satisfaction of Palm Beach

County and the Florida Department of Environmental Regulation.

18. Within one year of the effective date of the Development Order or prior to issuance of building permits for any commercial or office use within Downtown Uptown Development of Regional Impact, whichever occurs later, the developer shall prepare or cause to have prepared a hazardous materials management plan which shall be reviewed and approved by the City of West Palm Beach and Treasure Coast Regional Planning Council in consultation with Palm Beach County Solid Waste Authority and the Florida Department of Environmental Regulation. The plan shall:

    A. delineate materials which typically are present in office and commercial buildings and which are hazardous as defined by Rule 38F-41, Florida Administrative Code;

    B. describe generally improper, but common, disposal methods;

    C. describe generally appropriate disposal methods;

    D. provide a list of agencies which can be consulted regarding the proper handling and disposal of hazardous materials;

    E. describe a program to inform owners and tenants of the information contained in the plan; and

    F. typical spill cleanup methods.

Appendix G

The cost of plan review to Treasure Coast Regional Planning Council shall be paid by the Developer within 30 days of submission of a statement of the costs of review and approval.

WASTEWATER

19. No building permits shall be issued for any parcel of Downtown Uptown until the City of West Palm Beach has provided written confirmation that adequate capacity will exist to collect and treat the wastewater generated by development of that parcel.

SOLID WASTE

20. No building permits shall be issued for any parcel of Downtown Uptown until the Palm Beach County Solid Waste Authority or other authorized agency or authority has provided written confirmation that sufficient capacity exists to dispose of all solid waste generated by development of that parcel.

21. If a commitment is provided for solid waste disposal outside of Palm Beach County, upon receipt of notice from the Palm Beach County Solid Waste Authority, solid waste generated by development shall be directed to Palm Beach County facilities as indicated by the Authority.

EDUCATION

22. No building permits shall be issued for more than 700 residential units in Downtown Uptown until the Palm

Appendix G

Beach County Board of Education has provided written confirmation that impacts to the school system from development of those residential units have been adequately addressed.

POLICE AND PUBLIC SAFETY

23. No building permits shall be issued for any parcel of Downtown Uptown until the City of West Palm Beach Police Department has provided written confirmation that the Department has sufficient manpower and equipment to provide safe and adequate protection to the development in that parcel.

24. Prior to the approval of any site plans for the Downtown Uptown Development of Regional Impact, the developer shall consult with the West Palm Beach Police Department to ensure that development plans do not interfere with the ability of the Police Department to provide for public safety through consideration of adequate access to all parts of the project site, consideration of building layout, and other features which will help to ensure that the project is a safe and secure place to live and work.

FIRE PROTECTION

25. No building permits shall be issued for any parcel of Downtown Uptown until the City of West Palm Beach Bureau of Fire Prevention has provided written confirmation that the Bureau has sufficient manpower and equipment to provide safe and adequate protection

to the development in that parcel. If the Areawide Development of Regional Impact for the City Center area of West Palm Beach necessitates additional fire equipment or manpower, a fair share will be allocated to Downtown Uptown or a Citywide fire impact fee shall be adopted.

26. Prior to the approval of any site plans for the Downtown Uptown Development of Regional Impact, the developer shall consult with the West Palm Beach Bureau of Fire Prevention to ensure that all development complies with the City Building Code and City fire code.

ENERGY

27. In the final site and building design plans, each individual developer shall: 1) incorporate those energy measures identified on page 25-6 of the Downtown Uptown Application for Development Approval; 2) comply with the Florida Thermal Efficiency Code Part VII, Chapter 553, Florida Statutes; and 3) to the maximum extent feasible, incorporate measures identified in the Treasure Coast Regional Planning Council's Regional Energy Plan dated May 1979, and the Treasure Coast Regional Planning Council's Regional Comprehensive Policy Plan.

28. Each developer shall incorporate each of the 17 energy saving methods outlined on pages 51 and 52 in the ENERGY section discussion of the Treasure Coast Regional Planning Council's Assessment Report for

Downtown Uptown (attached as Exhibit B), except for methods 15 and 17, unless it can be demonstrated to the satisfaction of the City of West Palm Beach that individually each method is not cost effective.

TRANSPORTATION

29. No building permits for development shall be issued in the Downtown Uptown Development of Regional Impact until a contract is executed by the developer, the City of West Palm Beach and the Florida Department of Transportation providing for the exchange of rights-of-way for Okeechobee Boulevard, Jessamine Street, Georgia Avenue and Florida Avenue. The contract shall specifically provide for the following:

    A. The developer shall dedicate all right-of-way within the project boundaries owned by the developer, free and clear of all liens and encumbrances, necessary to accommodate the Phase 1 traffic improvements contained in Conditions 32 and 33, including right-of-way for bus bays, consistent with the Okeechobee Boulevard Corridor Study currently being prepared by Post, Buckley Schuh and Jernigan for the City of West Palm Beach and Palm Beach County. This right-of-way shall be adequate to accommodate possible future flyovers of Tamarind Avenue/CSX railroad tracks and FEC railroad tracks and connection to El Campion Boulevard, addressed in the previously-mentioned study.

Appendix G

B. The Florida Department of Transportation shall agree to abandon all rights-of-way within the project boundaries that are not to be used for roads once the improvements in Conditions 32 and 33 have been completed and to convey that property to Downtown Uptown, their successors and assigns, or adjacent land owners free and clear of all liens and encumbrances.

C. The City of West Palm Beach shall assist the developer of Downtown Uptown with negotiations for needed rights-of-way for the improvements listed in Conditions 32 and 33, and shall agree to exercise its power of eminent domain to acquire said rights-of-way. The City further agrees to initiate acquisition proceedings for the needed right-of-way within 30 days of completion of 30 percent design plans.

D. For right-of-way located outside the project boundary, the Downtown Uptown Venture shall pay all costs associated with eminent domain proceedings, including land, legal and court costs based on the amount of right-of-way necessary for construction of the improvements listed in Conditions 32 and 33 built to standard FDOT/ County cross-sections plus any amenity areas (such as medians or parkway features proposed by the developer in its cross-sections). Outside of the project boundary, government shall pay for the additional right-of-way necessary to build the ultimate improvements defined in the Okeechobee Boulevard Corridor Study.

Appendix G

E. The Downtown Uptown Venture shall pay the cost of acquisition for all rights-of-way within the project boundary. The Downtown Uptown Venture shall have final approval authority on any settlements negotiated in the acquisition process.

F. By September 1, 1989, the City shall provide profiles and cross-sections for the ultimate corridor improvements recommended by the previously-referenced Okeechobee Boulevard Corridor Study, and the profiles and cross-sections necessary to construct the improvements required by Conditions 32 and 33 within the cross-section limits of the ultimate roadway design.

G. The dedication of right-of-way for the future flyover of the FEC railroad tracks may contain a reverter clause providing that the City of West Palm Beach may not use that right-of-way for any other purpose.

30. A. Prior to the issuance of any building permits for new construction of nonresidential development, the developer must have fulfilled one of the following requirements:

(1) If the county elects to participate with the developer within six months of the effective date of this development order, the developer must have posted an irrevocable letter of credit or similar surety acceptable to the City of West Palm Beach for its share of the design,

right-of-way (pursuant to Condition 29.D.), and construction of the improvements at the intersection of Okeechobee Boulevard and Tamarind Avenue necessary to maintain peak hour peak season Level of Service D, or any lower level of service adopted by the City, through buildout of Phase 1A and the County's 840,000 square foot courthouse construction program. Palm Beach County and the developer shall split the cost of the engineering study necessary to determine the required intersection improvements and the proportionate costs described below, and the engineering study must be approved by the City. The cost of the construction shall be split between the developer and Palm Beach County based on the percentage of new trips attributable to each as against the sum of the trips of each as identified in the engineering study. The developer shall authorize the engineering study within 30 days of the County's election to participate and the study shall be completed by March 31, 1990. The developer shall post its surety within 30 days of acceptance of the engineering study by the City. If the developer desires to pull building permits before completion or acceptance of the engineering study, the developer may post surety based on the developer's and City's best estimate of the amount of surety to be required by the engineering study, and such surety shall be modified to conform to the amount

identified in the engineering study within 30 days of acceptance of the study by the City; or

(2) If the County does not elect to participate with the developer, the developer shall have let a contract for the construction of improvements at the intersection of Okeechobee Boulevard and Tamarind Avenue necessary to maintain peak hour peak season Level of Service D or any lower Level of Service adopted by the City, based on a city-approved engineering study. Such study shall be required to consider only existing traffic, project traffic and background traffic, including any projects approved prior to the date of the study; or

(3) Let the contracts, with valid completion bonds, for the road improvements contained in Conditions 32 and 33. Any financial commitments by Palm Beach County for the improvements necessary pursuant to paragraph A(1) above shall be applied to the completion bond required by this paragraph.

B. If the developer secures any nonresidential building permits for new construction based on compliance with (1) or (2) above, no certificates of occupancy shall be issued for that nonresidential development until the developer has posted an irrevocable letter of credit, or similar surety acceptable to the City of West Palm Beach, for its fair share of the road improvements contained in Conditions 32 and 33.

Such surety shall be subject to being drawn against by the City three (3) years after posting of the surety, if contracts for said road improvements have not been let.

31. The initial construction for this project, designated as Phase 1A, is limited to 500,000 square feet of office space or the equivalent trip generation based on the trip generation table in Exhibit C, which is from page 31-82 of the Application for Development Approval for this project. If a land-use category is not addressed in that table, trip generation shall be determined using the 4th Edition of the Trip Generation Manual prepared by the Institute of Traffic Engineers.

32. No building permits shall be issued beyond Phase 1A of the Downtown Uptown Development of Regional Impact until all contracts have been let for the following roadway improvements:

    A. Eight-laning of Okeechobee Boulevard (S.R. 704) from Australian Avenue to Tamarind Avenue consistent with Paragraph 29.F.; otherwise, the improvements may be configured based on the existing alignments west of Lake Avenue.

    B. Four-laning eastbound of Okeechobee Boulevard (S.R. 704) between Tamarind Avenue and Dixie Highway consistent with Paragraph 29.F; otherwise, the improvements may be configured based on the existing alignments west of Lake Avenue.

C. Four-laning westbound of Jessamine Street between Tamarind Avenue and Dixie Highway; consistent with Paragraph 29.F; otherwise, the improvements may be configured based on the existing alignments west of Lake Avenue.

D. Three-laning southbound Georgia Avenue between Hibiscus Street and M Street consistent with Map H, Master Development Plan of the Downtown Uptown DRI/ADA.

E. Three-laning southbound Florida Avenue between Hibiscus Street and M Street consistent with Map H, Master Development Plan of the Downtown Uptown DRI/ADA.

No certificates of occupancy beyond Phase 1A shall be issued for the Downtown Uptown Development of Regional Impact until the improvements under A, B, C, D and E above have been completed.

The construction design plans for the improvements required by this condition shall be completed by the developer no later than eighteen months from the date the City provides the profiles and cross-sections for the ultimate Okeechobee corridor improvements described in Paragraph 29.F. Surety, acceptable to the City of West Palm Beach, if deemed necessary, shall be posted within 60 days from the receipt by the developer of these profiles and cross-sections.

33. No building permits shall be issued beyond Phase 1A until all contracts have been let for the following

intersection improvements, including signalization improvements:

A. Okeechobee Boulevard/Tamarind Avenue (consistent with Paragraph 29.F); otherwise, the improvements may be configured based on the existing alignments west of Lake Avenue.

North Approach
one free flow right-turn lane
three through lanes
one left-turn lane

East Approach
four through lanes
one left-turn lane

South Approach
one right-turn lane
three through lanes
one left-turn lane

West Approach
one right-turn lane
four through lanes
two left-turn lanes

B. Okeechobee Boulevard/Georgia Avenue.

North Approach
one through lane
one through/left-turn lane
one left-turn lane

West Approach
four through lanes

C. Okeechobee Boulevard/Florida Avenue.

South Approach
three through lanes

West Approach
three through lanes
one through/left-turn lane
one left-turn lane

Appendix G

D. Jessamine Street/Dixie Highway.

North Approach
one right-turn lane
three through lanes

East Approach
three through lanes
two left-turn lanes

E. Jessamine Street/Georgia Avenue.

North Approach
one right-turn lane
one right-turn/through lane
one through lane

East Approach
four through lanes

F. Jessamine Street/Florida Avenue.

South Approach
three through lanes

East Approach
four through lanes

G. Dixie Highway/First Street.

North Approach
one right-turn lane
three through lanes

East Approach
two through lanes
one left-turn lane

West Approach
one through lane
one left-turn lane

Additionally, the following intersection improvements shall be constructed by the developer if the City notifies the developer, by the end of Phase 1, that the improvements are required based on traffic conditions:

Appendix G

H. Okeechobee Boulevard/Tamarind Avenue

East Approach
one right-turn lane

I. Okeechobee Boulevard/Georgia Avenue

West Approach
one right-turn lane

J. Okeechobee Boulevard/Florida Avenue

South Approach
one right-turn lane

K. Jessamine Street/Georgia Avenue

East Approach
one left-turn lane

All intersection improvements shall be designed and constructed in accordance with the standards of the City of West Palm Beach, Palm Beach County and the Florida Department of Transportation.

No certificates of occupancy beyond Phase 1A shall be issued for the Downtown Uptown Development of Regional Impact until the improvements under A, B, C, D, E, F and G above have been completed.

34. As a minimum the developer shall pay a fair share contribution toward road improvements consistent with

the road impact fee ordinance of Palm Beach County and/or the City of West Palm Beach to the extent either is applicable to this project. In no event, however, shall the developer have to pay more than its fair share of the actual costs of roadway improvements required by the development order or the City's ADRI development order to accommodate the development authorized for Downtown Uptown. If the developer advances the funds to build an improvement, it shall be subject to reimbursement by the City for that portion of the funds which exceed the developer's fair share of the costs.

35. No additional building permits for Phase I shall be issued after December 31, 1995, unless the improvements in Conditions 32 and 33 are under construction or a traffic study has been conducted by the developer and submitted to and approved by the City of West Palm Beach, in consultation with Palm Beach County, Florida Department of Transportation, and Treasure Coast Regional Planning Council, which demonstrates that the regional roadway network can accommodate a specified amount of additional Phase I Downtown Uptown Development of Regional Impact generated traffic and growth in background traffic beyond 1995 and can still be maintained at Level of Service C during Average Annual Daily Traffic conditions and Level of Service D during peak hour, peak season conditions, unless a lower level-of-service standard is approved for the proposed Areawide Development of Regional Impact for the City Center area of West Palm Beach.

Appendix G

The traffic study shall be conducted in 1995 and shall identify the improvements and timing of those improvements necessary to provide Level of Service C under average annual daily conditions and Level of Service D under peak hour, peak season operating conditions for the subject transportation network during the projected completion of the project, including project impacts and growth in background traffic, unless a lower level-of-service standard is approved for the proposed Areawide Development Regional Impact for the City Center area of West Palm Beach.

Unless the improvements in Conditions 32 and 33 are under construction, no additional building permits for Phase I shall be issued after December 31, 1995 until a new Phase I project-phasing program and roadway improvement program necessary to maintain acceptable levels of service has been approved by the City of West Palm Beach, and the Treasure Coast Regional Planning Council in consultation with Palm Beach County and Florida Department of Transportation for the remainder of Phase I development.

The limitation of this paragraph shall not apply if the additional building permits for Phase 1 are consistent with an approved Development Order for the Areawide DRI for the City Center area of West Palm Beach.

HOUSING

36. The Downtown Uptown DRI shall be subject to any formula established in the Areawide DRI requiring the

construction of a certain number of new housing units for each specified amount of new office or retail space constructed in the City Center area of West Palm Beach or a contribution to a housing fund for the City Center. Absent such a formula, the Downtown Uptown project shall:

A. (1) receive certificates of occupancy for at least 225 residential units within the project boundaries before receiving building permits for more than 1,250,000 square feet of office or commercial space;

(2) receive a certificate of occupancy for or pay to the City $6,000 for each of 225 additional residential units before receiving building permits for more than 2,500,000 square feet of office or commercial space;

(3) receive a certificate of occupancy for or pay to the City $6,000 for each of 250 additional residential units before receiving building permits for more than 3,750,000 square feet of office or commercial space.

(4) The $6,000 per unit figure shall be adjusted annually for inflation in accordance with annual changes in the Consumer Price Index, for the City of West Palm Beach Urban Wage Earners and Clerical Workers, All Items (base index year 1977 = 100) as published by the United States Department of Labor, Bureau of

Labor Statistics. If the manner in which the Consumer Price Index is determined by the Bureau of Labor Statistics shall be substantially revised, including without limitation, a change in the base index year, an adjustment shall be made by the City in such revised index which would produce results equivalent, as nearly as possible, to those which would have been obtained if such Consumer Price Index had not been so revised. If the Consumer Price Index shall become unavailable to the public because publication is discontinued, or otherwise, or if equivalent data is not readily available to enable the City to make the adjustment referred to in the preceeding sentence, then the City will substitute therefor a comparable index based on changes in the cost of living or purchasing power of the consumer dollar published by any other government agency or, if no such index shall be available, then a comparable index published by a major bank or other financial institution or by a university or a recognized financial publication.

B. In Area 3 (see Exhibit E) at least 60% of the building coverage shall be residential, no nonresidential use shall be located within 100 feet of the west and south boundaries of Area 3, and no nonresidential use shall front on or face Howard Park or Area 4.

C. The portion of Area 1 between Florida Avenue, Georgia Avenue and Hibiscus Street may be

developed with nonresidential development as if it were a part of Area 2 provided that a land area of at least 2.5 acres which is contiguous to those parts of Area 1 which are located north of Iris Street and east of Georgia Avenue is made subject to the conditions and requirements of subsections D and E.

D. After the expiration of ten years after the effective date of this Development Order for the Downtown Uptown Development of Regional Impact, nonresidential development authorized for this project may be developed in Area 1, provided that:

(1) The developer, or owner of Area 1, gives the City at least 24 months notice of its intent to seek approval of nonresidential development in Area 1.

(2) A market feasibility study, carried out by a professional market research or development feasibility expert with substantial experience with and knowledge of residential real estate in South Florida, and who has been approved by the City of West Palm Beach, demonstrates that residential development in Area 1 is not economically feasible based on the following assumptions or criteria as indicators of economic feasibility:

(a) A projected annual absorption rate which is similar to comparable dwelling units in the West Palm Beach market area.

(b) With respect to "For Sale" units, a developer profit of not less then 6% of the total cost of each dwelling unit, with "total cost" including, but not limited to, land, site improvements, parking, construction, materials, labor, governmental fees, general contractor's fee, off-site overhead, interest, real estate taxes, insurance, design and development costs, marketing, and direct personnel costs apportioned per unit. For the purposes of this section, land costs shall be determined upon the basis of Item #3 below.

(c) With respect to rental units, a return of 10% on equity after debt service. For the purposes of this section, land costs shall be determined upon the basis of Item #3 below.

(3) The land within Area 1 of Downtown Uptown area reserved for residential purposes has been unconditionally (except for restrictions or covenants intended to ensure the use and design compatibility of development with buildings developed in Area 2) offered for sale to the public, including the City, for a period of not less than two years immediately prior to the submittal of a request to the City for approval of nonresidential purposes in Area 1. Provided, however, in no event must the sale price be less than the developer's 1987 purchase price

or the current appraisal price, whichever is greater.

(4) Nonresidential utilization of the residential parcels discussed above shall require formal approval from the City of West Palm Beach. Said approval shall be granted if the provisions of this subsection D have been met.

E. Notwithstanding the conditions and/or requirements of subsections C and D, nonresidential uses may be developed in Area 1 if:

(1) A convention center or other public use, other than or in addition to a performing arts school, is developed on the site of Twin Lakes High School and the nonresidential use of Area 1 is approved by the City Commission of the City of West Palm Beach after consideration of the approval at a duly noticed public hearing; or

(2) A certificate of occupancy within the project boundaries has been received or payment to the City of $6,000, subject to the inflation factor in Paragraph 36.A.(4), has been made for each of 700 residential units.

F. Subject to the above Housing conditions, at any time an additional amount of nonresidential development may be approved in that portion of Area 1 south of the north right-of-way line of Hibiscus Street in order to satisfy the requirement

of a "drop-in" office user, provided that said "drop-in" shall not be in excess of the 3.89 million square feet of nonresidential uses to be developed within the boundaries of the Downtown Uptown DRI. For the purposes of this phase, a "drop-in" user shall be a single tenant or occupant that has entered into a binding contract to occupy at least 60% of a building or buildings and:

(1) is of a character that has previously been unknown (i.e. no current presence) to Palm Beach County and for which there is no sound economic reason to forecast or have forecasted such user's location within the City of West Palm Beach; or

(2) is of a character that will have a dramatically beneficial effect on the economy of the City of West Palm Beach.

37. The building height in Parcels 6, 9, 10 and the southern part of 7 shall be compatible with surrounding residential housing.

38. No limit to the number of residential units that may be constructed shall be placed on this project other than those limits based on concern for provision of services, health, safety, and welfare, and urban design issues. Factors traditionally limiting residential intensity such as minimum parking requirements and transportation constraints shall not be arbitrarily applied without due consideration being given to other competing issues of regional and local concern.

Appendix G

39. At such time as the City of West Palm Beach develops and adopts an Urban Design Code for the City Center Planning Area, no further construction permits shall be issued for development within the Downtown Uptown project that do not conform to this code. The developer shall provide to the City of West Palm Beach within six months of the effective date of the Development Order design guidelines for development in the project. The recommendation included within Exhibit HO-1 of the Assessment Report for Downtown Uptown (see attached Exhibit D) shall be considered and discussed in the drafting of the guidelines. Said guidelines shall be followed by the developer until such time as the City has adopted an Urban Design Code for the City Center.

CONVERSION OF USES

40. The mount of each of the general use categories of Commercial, Retail, Residential, and Hotel authorized by this Development Order may be exceeded by way of a conversion from one use category to another in accordance with the equivalency factors set forth in this provision, provided that (a) the total amount of any land use category that may be converted to another category should not exceed 25 per cent of the of the amount of development permitted for the land use category from which the conversion shall not result in an increase of more than 150 per cent of the amount of the general land use category to which the conversion is to be made, and (c) the total of development in the DRI does not exceed the total equivalent development authorized for the DRI.

Appendix G

Conversions shall be made by calculating an equivalency factor based upon the peak-hour traffic generation rates in the fourth edition of the Institute of Traffic Engineers Trip Generation Manual.

SITE PLAN REVIEW

41. A. *Intent*

Since the master plan for the project does not contain actual building footprints, the City Planning Board and the City Commission shall retain the ability to review the specific site development proposals for each site. This review will ensure that the development of individual parcels is consistent with the conditions of approval contained in this development order and that the design characteristics of each component have no substantial, adverse effect on surrounding properties. This special process shall be referred to as Level 3 Site Plan Review.

B. *Process*

Site plans for each parcel or portion of a parcel contained within this project shall be submitted to the Administrator of Community Development and Planning prior to the issuance of any building permit. The site plan shall be submitted to the City Planning Board and the City Commission for its review and, unless postponed pending submission of additional information, shall be acted upon by the City Planning Board within 45 days following the receipt of a

completed application and shall be acted on by the City Commission within 60 days after the close of the public hearing conducted by the Planning Board. Failure of the City Commission to review a complete application within this period shall result in automatic approval. Minor changes to be approved site plans shall be approved by the Administrator of Community Development and Planning, or his/her designee. Minor changes are those changes that do not trigger Level I or Level II site plan review pursuant to Section 33.15(e)(5) and (6), West Palm Beach Zoning Code.

C. *Standards*

The Planning Board and City Commission review of individual site plans is limited to the site design qualitative development standards contained in Section 33-15 (c), West Palm Beach Zoning Code, and the conditions of approval contained in this development order. Additionally, the City Commission review shall include the review of any application for a Class A or Class B Special Use and any application for a waiver or reduction of additional standards for a special use or a use permitted with extra requirements submitted with the site plan application. During Level 3 Site Plan Review, the City Commission may exercise its authority to relax or waive zoning code requirements pursuant to Section 33-86, West Palm Beach Zoning Code.

DEMOLITION OF EXISTING STRUCTURES

42. Prior to issuance of any building permits or within a maximum of 60 days after the expiration of the appeal

period for this Development Order, the developer shall demolish all structures, with the exception of the seven structures addressed in Paragraph 7 of this Development Order, and remove all material in an approved manner. Should the developer fail to comply with this condition, the City is hereby given the right, pursuant to the City Code, to demolish said structures and place liens for costs incurred. No building permits for any portion of the Downtown Uptown project shall be issued until these liens and applicable interest is paid in full. Certain structures may be exempted from this requirement with the approval of the City Commission.

SUBDIVISION OF LAND

43. Prior to the issuance of any building permits for construction on any parcel, the applicant shall provide, in a form acceptable to the City Engineer and the Administrator of Community Development and Planning, for the subdivision and platting of all parcels to be developed. The subdivision and platting of individual parcels shall be performed pursuant to the City standards for a major subdivision.

RIGHT-OF-WAY ABANDONMENT

44. Abandonment of public rights-of-way, as indicated by attached Exhibit F, is authorized by adoption of the overall Development Order, and shall occur in the following manner:

    A. The applicant shall submit to the Administrator of Community Development and Planning a request

to abandon all or portions of one or more specific rights-of-way.

B. The request shall include a legal description of the property to be abandoned, such legal agreements or release as deemed appropriate by the City Attorney, and such fees as deemed appropriate by the Administrator of Community Development and Planning.

C. The Administrator of Community Development and Planning shall initiate a review of the abandonment request, such review to included the following City departments: Engineering, Public Works, Law, Utilities, Police, Fire, Community Development and Planning, and such other departments are deemed appropriate.

D. Following the review by City departments and upon a finding the request for abandonment is consistent with the overall development approval, the City Manager is authorized on behalf of the City Commission to sign such forms or releases as have been approved by the City Attorney to allow abandonment of all or a portion of one or more public rights-of-way.

LANDSCAPING AND TREE PROTECTION PLAN

45. Prior to the issuance of any building permits for a particular site, the applicant shall provide, in conformance to the City of West Palm Beach Zoning

Code and in a form acceptable to the Administrator of Community Development and Planning, a landscape and tree protection plan for the site. Such plan shall specifically address preservation, protection, and relocation of significant vegetation within the site.

DESIGN REQUIREMENTS

46. All rooftop and ground level mechanical equipment, including but not limited to such items as public and private utility service connections; heating, ventilating, and air conditioning systems; communications devices; and related equipment, shall be screened from public view through any combination of landscaping, walls, and equipment location.

47. The applicant shall submit an overall project signage plan with every Level III Site Plan Application. However, no high, free-standing signs shall be permitted.

48. Prior to the issuance of any building permits affecting any parcel abutting a residential zoning district the applicant shall provide, in a form acceptable to the Administrator of Community Development and Planning, an overall program for the protection of the residential uses. The program shall include protective measures to be utilized during all phases of construction, and shall include a screening and buffering plan. The screening and buffering plan shall include, but is not limited to the use of such techniques as landscaping, opaque walls, linear buffers, and related items.

Appendix G

PARKS

49. Prior to the issuance of any permits for park construction, detailed plans and specifications shall be approved by the City Manager.

CAPITAL FACILITIES COSTS

50. Not withstanding any other provisions of this Development Order, all development within the Downtown Uptown DRI shall make payment for any fair share capital facilities costs imposed by the Development Order for the City of West Palm Beach Areawide DRI as if the Downtown Uptown DRI was fully subject to that Development Order. If the developer advances the funds to build an improvement, it shall be subject to reimbursement by the City for that portion of the funds which exceed the developer's fair share of the costs. The City and the County, which ever is appropriate, shall assist and cooperate at the request of Downtown Uptown in the establishment within Downtown Uptown of special taxing and assessment districts, units, zones, areas, or other such mechanisms for the provision of infrastructure for Downtown Uptown.

MINORITY BUSINESS PARTICIPATION

51. The developer shall comply with any provisions adopted by the City which apply to the City Center with respect to minority and women's business enterprise.

Appendix G

SECTION 4: The requirements in Conditions 41 through 51 are local in nature. Therefore, any changes to these conditions by the City shall not constitute substantial deviations and shall not be subject to the substantial deviation provisions of Section 380.06(19), Florida Statutes. Any modifications or deviations from the other requirements of this Development Order shall be submitted to the City's Community Development and Planning Administrator for a determination by the City Commission of the City of West Palm Beach as to whether the change constitutes a substantial deviation as provided Section 380.06(19), Florida Statutes, and such modification shall be processed pursuant to Section 380.06, Florida Statutes, as the same may be amended from time to time.

SECTION 5: Compliance with the Development Order shall be monitored through normal City permitting procedures, the procedures in specific conditions of approval, and review of the annual report. The local official responsible for assuring compliance with this Development Order is the Community Development and Planning Administrator for the City of West Palm Beach.

SECTION 6: The annual report required by Section 380.06(19), Florida Statutes, shall be submitted each year within ten (10) days of the anniversary date of the effective date of this Development Order. The annual report shall be submitted to the City of West Palm Beach, the Treasure Coast Regional Planning Council, the Department of Community Affairs, the State of

Appendix G

Florida Department of Environmental Regulations and the South Florida Water Management District. This annual report shall include the following items:

1. Any changes in the plan of development, or in the representations contained in the Application for Development Approval, or in the phasing for the reporting year and for the next year.

2. A summary comparison of development activity proposed and actually conducted for the year.

3. Undeveloped tracts of land that have been sold to a separate entity or developer.

4. Identification and intended use of any lands purchased, leased or optioned by the developer adjacent to the original DRI site since the Development Order was issued.

5. An assessment of the developer's and the local government's compliance with the conditions of approval contained in this DRI Development Order and the commitments which are contained in the Application for Development Approval and which have been identified by the City of West Palm Beach, the Treasure Coast Regional Planning Council or the Department of Community Affairs as being significant.

6. Any known incremental DRI Application for Development Approval or request for substantial deviation determination that were filed in the reporting year or are to be filed during the next year.

Appendix G

7. An indication of a change, if any, in local government jurisdiction for any portion of the development since the Development Order was issued.

8. A list of significant local, state and federal permits which have been obtained or which are pending by agency, type of permit, permit number and purpose of each.

9. A statement that all persons have been sent copies of the annual report in conformance with subsections 380.06(15) and (18), Florida Statutes.

10. A copy of any recorded notice of the adoption of a Development Order or the subsequent modification of an adopted Development Order that was recorded by the developer pursuant to subsection 380.06(15)(f), Florida Statutes during the reporting year.

SECTION 7: Compliance dates for commencing development and complying with conditions of approval and phasing requirements are listed in the conditions of approval. This Development Order shall terminate twenty-four years after the effective date of this Development Order.

SECTION 8: The City of West Palm Beach hereby agrees that the Downtown Uptown Development of Regional Impact shall not be subject to downzoning, unit density reduction, or intensity reduction for a period of twenty-four years from the effective date of this Development Order, unless the City of West Palm Beach can

demonstrate that substantial changes in the conditions underlying the approval of the Development Order have occurred or that the Development Order was based on substantially-inaccurate information provided by the developer, or that the change is clearly established by the City of West Palm Beach to be essential to the public health, safety, or welfare.

SECTION 9: The definitions found in Chapter 380, Florida Statues, shall apply to this Development Order. It is understood that any reference herein to any governmental agency shall be construed to mean any future instrumentally which may be created or designate as successor in interest to, or which otherwise possesses any of the powers and duties of any referenced government agency in existence on the effective date of this Development Order.

SECTION 10: The approval granted by this Development Order is conditional and shall not be construed to obviate the duty of the developer to comply with all other applicable local, state, and federal permitting requirements.

SECTION 11: In the event that any portion or section of this Development Order is deemed to be invalid, illegal, or unconstitutional by a court of competent jurisdiction, such decision shall in no manner affect the remaining portions of this Development Order, which shall remain in full force and effect.

SECTION 12: Certified copies of this Development Order shall be transmitted by certified mail to the State of

Florida Department of Community Affairs, the Treasure Coast Regional Planning Council and the Developer. A Notice of Adoption of this Development Order shall be filed and recorded in the public records of Palm Beach County, Florida, by the Downtown Uptown Venture, within ten (10) days after adoption.

SECTION 13: This Development Order shall not be construed as a waiver of any City, County, or State requirements for other necessary permits, building permits, certificates of occupancy, or similar matters provided for by statute, rule, or ordinance, unless said requirements are specifically waived in this Order.

SECTION 14: This Development Order shall be binding upon and inure to the benefit of the Developer and its assigns or successors in interest and the present owners and their assigns or successors in interest. It is understood that any reference herein to any governmental agency shall be construed to also include any future instrumentality which may be created and designated as successor in interest to, or which otherwise possesses any of the powers and duties or, any referenced governmental agency in existence on the effective date of this Development Order.

SECTION 15: In the event that any portion or section of this Development Order is determined to be invalid, illegal or unconstitutional by a court of competent jurisdiction, such decision shall in no manner affect the remaining portions or section of the Development Order which shall remain in full force and effect.

Appendix G

SECTION 16: This Development Order shall become effective immediately upon second reading.

FIRST READING THIS SIXTH DAY OF MARCH 1989.

SECOND AND FINAL READING THIS TWENTIETH DAY OF MARCH 1989.

(CORPORATE SEAL) CITY OF WEST PALM BEACH
BY ITS CITY COMMISSION

s/ [illegible]
ATTEST: MAYOR

s/ Agnes E. Hayhurst
City Clerk

APPROVED AS TO FORM

s/ Carl V.M. Coffin
City Attorney

March 22, 1989

I hereby certify this to be a true and correct copy of the City of West Palm Beach Ordinance No. 2268-89 as approved by the City Commission March 20, 1989 and consisting of 38 pages.

s/ Agnes E. Hayhurst
City Clerk

Appendix G

EXHIBIT A

LEGAL DESCRIPTION FOR DOWNTOWN UPTOWN

BEING THAT PART OF SECTION 21 AND 28, TOWNSHIP 43 SOUTH, RANGE 43 EAST, PALM BEACH COUNTY, FLORIDA. MORE PARTICULARLY DESCRIBED AS FOLLOWS:

All of the following Blocks in the Plat of Palm Beach Heights, as recorded in Plat Book 2, page 74, Public Records, Palm Beach County, Florida:

> Block 1, 2, 3, 5, 6, 7, 8 and 10, together with all alleys, public right-of-way and easements contained therein and adjacent and appurtenant thereto.

AND

All of the following Blocks in the Plat of Moss & Heisler Addition to Palm Beach Heights, as recorded in Plat Book 2, page 61, Public Record, Palm Beach County, Florida;

> Block 10 less the East 55 feet of Lots 9 to 11 inclusive, together with all alleys, public rights-of-way and easements contained therein and adjacent and appurtenant thereto.

AND

All of the following Blocks in the Plat of Model Land Company's Addition to the City of West Palm Beach, as

recorded in Plat Book 1, page 106, Public Records, Palm Beach County, Florida;

Block 57; Block 59 less the South 100 feet of Lots 11 and 12 but including the North Six (6) inches of the South 100 feet of West 41 Feet of Lot 11; and Blocks 60, 61, 63, 64, 65, 66, together with all alleys, public rights-of-way and easements contained therein and adjacent and appurtenant thereto.

AND

All of the following Blocks in the Plat of Highland Park Addition, as recorded in Plat Book 1, page 122, Public Records, Palm Beach County, Florida;

Blocks 67 and 68; Block 69 less Lot 1 and the North 42 feet of Lots 10 and 11; and Blocks 70, 73, and 75; Block 76 less Lots 8 and 9, together with all alleys, public rights-of-way and easements contained therein and adjacent and appurtenant thereto.

AND

All of the following Blocks in the Plat of West Palm Beach, as recorded in Plat Book 1, page 2, public records, Palm Beach County, Florida;

Block 32, together with all alleys, public rights-of-way and easements contained therein and adjacent and appurtenant thereto.

AND

Appendix G

All of the Block in the Plat of Subdivision of Block 58, Model Land Co. Addition to West Palm Beach, Florida, as recorded in Plat Book 2, page 65, Public Records of Palm Beach County, Florida:

> Block 58, less Lots 9 through 12 and Lot 18, together with all alleys, public rights-of-way and easements contained therein and adjacent and appurtenant thereto.

AND

A tract of land beginning at the Northwest corner of Lot 9, Block 75, Highland Park Addition to West Palm Beach, Florida, running thence West along the South line of Iris Street 62 feet; then South parallel with the West line of Lot 9, Block 75 aforesaid for a distance of 153 feet; thence East 62 feet to the Southwest corner of Lot 9, Block 75 aforesaid; then North 153 feet to the point of beginning, situated in the Southwest quarter of the Southeast quarter of Section 21, Township 43 South Range 43 East.

AND

A parcel of land lying West of a line parallel with and 62.00 feet West of, as measured at right angles to the West line of Lot 9, Block 75, HIGHLAND PARK, Addition to the City of West Palm Beach, Florida, according to the plat thereof on file in the Office of the Clerk of the Circuit Court in and for Palm Beach, Florida, recorded in Plat Book 1, page 122; and being more particularly described as follows;

AND

Appendix G

Beginning at the intersection of said parallel line with the South right-of-way line of Iris Street; thence South 00 00' 00" East, along said line, a distance of 153.00 feet to the Westerly extension of the South line of said Lot 9; thence, North 90 00' 00" West, a distance of 19.53 feet to a point on a curve concave Southwesterly, having a radius of 40.00 feet and whose radius point bears South 76 59' 50" West; thence, Northwesterly along said curve, through a central angle of 49 56' 16", a distance of 34.86 feet to the point of reverse curvature of a curve concave Easterly, having a radius of 40.00 feet; thence, Northerly along said curve, through a central angle of 82 02' 49", a distance of 57.28 feet to the point of tangency; thence, North 19 06' 23" East, a distance of 49.19 feet to the point of curvature of a curve concave Southeasterly, having a radius of 46.36 feet; thence, Northeasterly along said curve, through a central angle of Northeasterly along said curve, through a central angle of 70 53' 37", a distance of 57.36 feet to the point of beginning.

A parcel of land being in the Southeast Quarter of Section 21, Township 43 South, Range 43 East, Palm Beach County, Florida, as shown on the Plat of Addition to the West Palm Beach for the Highland Park Land Co. (Inc), according to the Plat thereof, as recorded in Plat Book 1, page 122, Public Records of Palm Beach County, Florida, being more particularly described as follows:

Begin at a point being the Northwest corner of Lot 10, Block 75 according to Plat Book 1, Page 122, extend Westerly along the westerly extension of the North Line of Lot 10 a distance of 133.74 feet; thence a distance

off 202.63 feet on a straight line to the Southwest corner of said Lot 10; thence north along the West line of said Lot 10 a distance of 153.0 feet to the Point of Beginning.

AND

A parcel of land beginning a point, said point being the Southwest corner of Lot 7, Block 76, Highland Park Addition, West Palm Beach, said point being the point of beginning, thence proceeding in a northerly direction along a line a distance of 153 feet, said line being the West line of Lot 7, Block 76, Highland Park Addition, to a point which is the Northwest corner of Lot 7, Block 76, Highland Park Addition thence proceeding in a westerly direction along a line, said line being the North line of Lot 7, Block 76, Highland Park Addition, proceeding a distance of 50 feet to a point thence proceeding in a Southeasterly direction along a line to the point of beginning. Subject to right-of-way for Okeechobee Road, Lake Avenue and Jessamine Street.

Containing 76.90 acres, more or less.

Appendix G

EXHIBIT B

ENERGY SAVING METHODS

1. Use computerized load management where cost-effective and economically feasible.

2. Preserve native vegetation and topography in order to retain their natural energy conserving benefits.

3. Promote car pooling and van pooling through incentives such as priority parking areas.

4. Encourage incentives to nonautomotive travel such as provision of sheltered bus stops, bicycle locking facilities, shaded pathways, and protected crossings.

5. Participate in a systematic approach to the development of walkway and bicycle path networks with the local government that will result in safe, convenient links between home, work, shopping, recreation and schools.

6. Use energy-efficient features in window design (e.g., tinting and exterior shading.).

7. Use operable windows and ceiling fans.

8. Install energy-efficient appliances and equipment.

9. Reduce coverage by asphalt, concrete, rock, and similar substances in streets, parking lots, and other areas to reduce local air temperatures and reflect light and heat.

10. Install energy-efficient lighting for streets, parking areas, recreation areas, and other interior and exterior public areas.

11. Use water closets with a maximum flush of 3.5 gallons and shower heads and faucets with a maximum flow rate of 3.0 gallons per minute (at 60 pounds of pressure per square inch) as specified in the Water Conservation Act, Section 553.14 Florida Statutes.

12. Select native plants, trees, and other vegetation and landscape design features that reduce requirements for water, fertilizer, maintenance and other needs.

13. Plant native shade trees to provide reasonable shade for all recreation areas, streets, and parking areas.

14. Place trees to provide needed shade in the warmer months while not overly reducing the benefits of sunlight in the cooler months. (Shade in the summer should receive primary consideration.)

15. Orient structures, as possible, to reduce solar heat gain by walls and windows and to utilize the natural cooling effects of the wind. (A general east-west orientation will usually expose the smallest area to the strong morning and afternoon sun, as will reduced glass area on the east and west sides of buildings, especially buildings over three stories in height.)

16. Provide structural shading (e.g., trellises, awnings, and roof overhangs) wherever practical when natural shading cannot be used effectively.

Appendix G

17. Use solar hot water heating systems or photovoltaic energy systems.

SOURCE: Treasure Coast Regional Planning Council, "Downtown Uptown Assessment Report," pages 51 and 52, February 1989.

Appendix G

EXHIBIT C

of data in the Fourth Edition for this land-use. The generation rates used for the various land-uses and the trips produced by those land-uses for each phase are as follows:

Existing Development Traffic Generation

Land-Use	Units	AM Pk Hr. Gen/ Rate	AM Peak Hr. Trps.	PM Pk Hr. Gen/ Rate	PM Peak Hr. Trps.
Retail (810)	75,484sf	4.32/ 1000sf*	326	4.32/ 1000sf*	326
Light (110) Industry	32,118sf	1.65/ 1000sf	53	1.60 1000sf	51
Commercial (816)	23,027sf	1.084/ 1000sf	25	4.867/ 1000sf	112
Institutional (560)	78,519sf	0.108/ 1000sf	8	0.641/ 1000sf	50
Recreation	9,420sf	—	0	—	0
Single-Family (210)	350du	0.754/ unit	264	1.005/ unit	352
Low-Rise Apts. (221)	350du	0.519/ unit	182	0.628/ unit	220
Office (710)	20,196sf	2.259/ 1000sf*	46	2.32/ 1000sf*	47
Total Peak Hour Trips			904		1158

* Reflects 10% Downtown Reduction Factor

Appendix G

The existing traffic generation totals represent "book value" — the amount of traffic that could be generated by the development program if the businesses were operating successfully and the residential units were totally occupied. This could be considered the traffic potential of the existing development program.

Amended 1/4/89

Appendix G

EXHIBIT D

TREASURE COAST REGIONAL PLANNING COUNCIL

3228 s.w. martin downs blvd.
suite 205 • p.o. box 1529
palm city, florida 34990
phone (407) 286-3313

jim minix
chairman

thomas g. kenny, III
vice chairman

john acor
secretary/treasurer

daniel m. cary
executive director

June 29, 1988

Mr. James R. Brindell
Gunster, Yoakley, Criser & Stewart
Phillips Point, Suite 500
777 S. Flagler Drive
West Palm Beach, FL 33401

Subject: Downtown/Uptown Development of Regional Impact

Dear Jim:

Here is a first draft of issues and standards that I feel should be somehow incorporated into the Downtown/Uptown plan. It is a first draft. I am not happy with the organization, and

more explanation probably needs to be provided. I would appreciate it if you would limit the distribution of this draft to the applicant and his consultants until we have had time to talk and until I provide a final letter.

Generally the recommendations included here are related to the desire to create a vital, attractive, primarily pedestrian, urban environment. It is important that people be able to get to the city by car relatively conveniently; but a central theme here is that once within the bounds of the city, other forms of transportation take over. In order of prevalence, travel within the city should be by foot; or by transit, shuttle, or taxi; and only secondarily by personal cars.

Another point worth emphasizing is that the revitalization of West Palm Beach as an urban area will only be successful to the extent an urban amenity package is delivered. We must be careful not to fall in the trap of trying to deliver suburban values, or we will end up with nothing and fail.

Before this project is approved, I believe it is fair to expect that adequate commitments be made so that we have some reasonable assurance that what gets built will be of lasting value and benefit to the city and Region. I am struggling to define minimum standards that can be agreed to so as to assure this, while at the same time providing sufficient flexibility to assure the financial success of the applicant.

I am coming to the conclusion in my thinking that generally considerably more detail needs to be provided before plans are approved, and that the argument that we cannot provide detail because we do not know what the future may bring is

invalid. After all, projects should be built to have lasting value. Perhaps some of the worst we have allowed has been in response to fad, while other more traditional approaches have continued to function in different markets over very long periods of time.

I share the views articulated by Jacobs and Appleyard (1987, *Toward an Urban Manifesto*, APA Journal, Vol. 53(1) pp. 112-120) regarding the physical characteristics which must be present if a high quality urban environment is to exist. As a result, I offer my specific recommendations regarding critical design criteria in the context of the following general principles presented by them:

A) "People should be able to live in reasonable (though not excessive) safety, cleanliness, and security. That means *livable streets and neighborhoods*;, with adequate sunlight, clean air, tress, vegetation, gardens, open space, pleasantly scaled and designed buildings; without offensive noise; with cleanliness and physical safety."

Recommendation

To be determined.

B) "A *minimum density* is needed. By density is meant the number of people (sometimes expressed in terms of housing units) living on an area of land, or the number of people using an area of land . . .

. . . Some minimum number of people living and using a given area of land is required if there is to be

Appendix G

human exchange, public life and action, diversity, and community.

... The number and diversity of small stores and services — for instance groceries, bars, bakeries, laundries and cleaners, coffee shops, secondhand stores, and the like — to be found in a city or area is in part a function of density. That is, that such businesses are more likely to exist, and in greater variety, in an area where people live in greater proximity to each other ('higher' density).

... There must be a critical mass of people, and they must spend a lot of their time in reasonably close proximity to each other, including when they are at home, if there is to be urban life."

Recommendation

1. *Land uses within parcels 6, 9, 10, and the southern part of 7 should include a predominance of residential housing or apartments with appropriately located neighborhood retail and small-scale office opportunity.*

2. Residential should also be included within the area encompassed by parcels 1, 2, 3, 4, and 11.

3. *The minimum amount of residential to be provided south of Okeechobee is probably about 450 units*, with an equivalent number of units needed north of Okeechobee for a minimum total of 900 units.

Appendix G

4. *Residential units should be diverse in type and affordability (size) so as to provide residence opportunity for a full range of income levels.*

5. If a minimum density of residential is to be realized, the needs of these people should be provided for within the project. Needs include:

   Restaurants
   Dry cleaners
   Food shopping opportunities
   Day-care, which should perhaps occur at the existing church site, with adequate garden set aside around the church for such use.
   Theaters/meeting halls/and perhaps a ballroom, which should perhaps be accommodated within an especially significant structure at Site 5.

C) "There must be an *integration of activities* — living, working, and shopping, as well as public, spiritual, and recreational activities — reasonably near each other."

Recommendation

1. To encourage the mix of residential into the project, no more than 200 residential units should probably be permitted on any one parcel — unless additional units are to be provided above and beyond the 900 units recommended.

2. *Mixed use should occur throughout the entire district.*

Appendix G

3. *No vending machines should be permitted in any part of the project since these will reduce the demand for and viability of small retail such as coffee shops, news and tobacco shops, and restaurants, and reduce opportunities for human exchange.*

4. *Manned Kiosks should be permitted and encouraged to occur on the street.*

D) "In the urban environment, buildings (and other objects that people place in the environment) should be arranged in such a way as to define and enclose public space, rather than sit in space."

Recommendation

1. *Public spaces — streets and squares — should be designed first, before buildings*. . . the massing and design of the buildings is dependent on the dimensions of the public space and their intended purpose. . . the actual style of buildings is less important.

2. *A hierarchy of streets, relative to purpose and use, should be established and defined.* The defined purpose of a street should strongly influence its design and proportion (e.g., a street intended for active retail life will have a different design than one intended to move people through an area on to another area).

3. *A diverse range of street types should exist, including alleys* for secondary commerce (e.g., dry cleaners), parking garage entrances, pedestrian access ways, etc.

Appendix G

4. *To the maximum extent possible, "super blocks" should be avoided and the existing grid pattern of the city maintained* — particularly in terms of the properties interconnection to adjacent roads outside the boundaries of the property.

5. *Street sections should be coded such that the ratio of perceived building height (cornice line set back) fall to street width (building face to building face) within a range of 1:1 to 1:2.5.* Street sections should never be greater than 1:2.5.

6. *Build-to lines should be established which are steady and even.*

7. *Sidewalks should be of 12-25 feet in width.*

8. *Street trees should be planted on all streets on steady and even lines.* Street tree plantings should be of a size to reinforce or create optimum street sections of a ratio of 1:1.

9. *Parcel and tract control should be mid block to mid block, rather than whole block.*

10. *Similar uses and building massing should occur on both sides of the street at ground levels.*

11. *Entrances to primary retail should always be at the street.*

12. *Parallel parking should be provided for on all streets, on both sides.*

13. *Parking garages and lots should occur at mid block, below ground, or above the first level of the street, and never at the building edge* (along pedestrian ways).

14. Maximum distance between streets should be 400 feet.

E. "Many different buildings and spaces with complex arrangements and relationships are required... Diversity, the possibility of intimacy, and confrontation with the unexpected stimulation, are all more likely with many buildings than with few taking up the same ground areas."

Recommendation

1. *The increment of development should be small so as to create a richer condition, diversity, complexity, and a reasonable street scale.* This is socially and aesthetically beneficial to the city and it politically and financially intelligent since huge expenditures are not required all at once, and major failures are avoided.

2. The phasing of development within the area should be such that no more than 30 percent (?) of the market demand of the city as a whole can be met by this project in any one year.

3. A maximum height limit for buildings should be established in the neighborhood of 12 stories, with the possible exception of parcel 5 providing its use is partly public. It is not that the building on parcel 5 needs to be any higher than 12 stories, rather that it should be a landmark building.

Appendix G

4. To the maximum extent possible, streets should be terminated with memorable structures and vistas to enhance the pride in the street and sense of place.

Sincerely,

s/ Daniel M. Cary
Daniel M. Cary
Executive Director

DMC:pk

Attachments

Appendix G

EXHIBIT E



Downtown Uptown
West Palm Beach, Florida

Map H
Master Development Plan

Legend

Amended 8/30/88

BEST AVAILABLE COPY

Appendix G

EXHIBIT F

RIGHT-OF-WAY ABANDONMENTS



APPENDIX H — TRIAL EXHIBIT NO. 72, CHART OF DOWNTOWN/UPTOWN PURPORTED ASSIGNMENTS OF DEVELOPMENT RIGHTS

[Fold-Out Chart Follows]

DOWNTOWN/UPTOWN PURPORTED ASSIGNMENTS OF DEVELOPMENT RIGHTS

DT/UT DRI PHASE I

(deMENDOZA, AS TRUSTEE or MINTMIRE, AS TRUSTEE)

1,155,070 SQFT. OFFICE
96,255 SQFT. RETAIL
400 HOTEL ROOMS
425 DWELLING UNITS

KRAVIS CENTER

ORED
Site Plan Approval (Portion of Block 56)
May 8, 1995
Resolution No. 156-95
21,000 SQFT. RET.
54,310 SQFT. OFC

FESTIVAL MARKETPLACE
RESOLUTION NO. 168-81
204,142 SQFT. OFC

RECORDED COLLATERAL ASSIGNMENT
5/89
deMENDOZA, VENTURE-HOWELL
8,600 SQFT. OFC
BLOCK 61 LOTS 4 & 5

RECORDED COLLATERAL ASSIGNMENT
5/89
deMENDOZA, VENTURE-GLUCK
8,600 SQFT. OFC
BLOCK 61 LOTS 17 & 18

RECORDED COLLATERAL ASSIGNMENT
5/89
deMENDOZA, VENTURE-GUFFEY
8,600 SQFT. OFC
BLOCK 61 LOTS 15 & 16

RECORDED COLLATERAL ASSIGNMENT
5/89
deMENDOZA, VENTURE-HOWELL GUFFEY, GLUCK
4,200 SQFT. OFC
BLOCK 61 LOT 19

RECORDED COLLATERAL ASSIGNMENT
3/88
deMENDOZA, VENTURE-NELSON
35,000 SQFT. OFC
BLOCK 8 LOTS 1-12

RECORDED COLLATERAL ASSIGNMENT
3/88
deMENDOZA, CARTWRIGHT
35,000 SQFT. OFC
BLOCK 7 ALL

RECORDED COLLATERAL ASSIGNMENT
10/89
deMENDOZA, VENTURE-WALKER
10,000 SQFT. OFC
BLOCK 61, LOT 1
BLOCK 2 LOTS 21-22

UNRECORDED COLLATERAL ASSIGNMENT
1/90
deMENDOZA, VENTURE-CARTWRIGHT
85,000 SQFT. OFC
BLOCK 69, LOTS 10 & 11
BLOCK 2, LOTS 3-4, 9, 15-16

RECORDED COLLATERAL ASSIGNMENT
2/90
deMENDOZA, VENTURE-MOORINGS
125,000 SQFT. OFC
BLOCK 69, LOTS 4 & 5
BLOCK 7, LOTS 1-10

UNRECORDED COLLATERAL ASSIGNMENT
2/90
deMENDOZA, VENTURE-CARTWRIGHT
42,500 SQFT. OFC
BLOCK 3, LOTS 13, 14 & 16
BLOCK 10, LOTS 12-17

UNRECORDED COLLATERAL ASSIGNMENT
3/90
deMENDOZA, VENTURE-CARTWRIGHT
50,000 SQFT. OFC
BLOCK 3, 15-16, 20-24
BLOCK 10, LOTS 1-5, 6-17

UNRECORDED COLLATERAL ASSIGNMENT
4/90
deMENDOZA, VENTURE-CARTWRIGHT
43,500 SQFT. OFC
BLOCK 2 LOTS 1, 7, 8, 12 & 24

UNRECORDED COLLATERAL ASSIGNMENT
7/90
deMENDOZA, VENTURE-CARTWRIGHT
20,000 SQFT. OFC
BLOCK 8 LOTS 1-12

RECORDED ABSOLUTE ASSIGNMENT
12/92
MINTMIRE, VENTURE-MOORINGS
370,000 SQFT. OFC
BLOCK 7 LOTS 1-10

RECORDED ABSOLUTE ASSIGNMENT
12/92
MINTMIRE, VENTURE-NELSON
350,000 SQFT. OFC
BLOCK 8 LOTS 1-12

RECORDED ABSOLUTE ASSIGNMENT
12/92
MINTMIRE, VENTURE-F. ROLFS
55,000 OFC, INC. 255 RET. 400 HOT, 425 RES. SQFT.
BLOCK 3, LOT 19

CERTIFICATE OF TITLE TO HOWELL FEE TITLE
8/26/92
8,600 SQFT. OFC
BLOCK 61 LOTS 4 & 5

CERTIFICATE OF TITLE TO GLUCK FEE TITLE
10/2/92
8,600 SQFT. OFC
BLOCK 61 LOTS 17 & 18

CERTIFICATE OF TITLE TO GUFFEY FEE TITLE
10/26/92
8,600 SQFT. OFC
BLOCK 61 LOTS 15 & 16

CERTIFICATE OF TITLE TO HOWELL, GUFFEY GLUCK FEE TITLE
5/23/92
4,200 SQFT. OFC
BLOCK 61 LOT 19

CERTIFICATE OF TITLE TO WALKER FEE TITLE
9/25/92
10,000 SQFT. OFC
BLOCK 61, LOT 1
BLOCK 2 LOTS 21-22

CERTIFICATE OF TITLE TO ADVANTAGE WEST PALM BEACH
1/17/96
NO DEVELOPMENT RIGHTS

CERTIFICATE OF TITLE TO ADVANTAGE WEST PALM BEACH
6/11/96
Above Lands Plus 125,000 SQFT. Development Rights

RECORDED ABSOLUTE ASSIGNMENT
12/94
MOORINGS-ADVANTAGE WFB, INC.
370,000 SQFT. OFC

RECORDED ABSOLUTE ASSIGNMENT
6/96
ADVANTAGE WFB TO BABCOCK
60,000 SQFT COMM.

RECORDED ABSOLUTE ASSIGNMENT
6/96
NELSON-ADVANTAGE WFB, INC.
350,000 SQFT. OFC

RECORDED ABSOLUTE ASSIGNMENT
4/94
F. ROLFS-MOORINGS
55,000 OFC, INC. 255 RET. 400 HOT, 425 RES. SQFT.

RECORDED ABSOLUTE ASSIGNMENT
12/94
MOORINGS-ADVANTAGE WFB, INC.
55,000 OFC, INC. 255 RET. 400 HOT, 425 RES. SQFT.

RECORDED ABSOLUTE ASSIGNMENT
12/94
MOORINGS-ADVANTAGE-ORED
50,000 RET. SQFT.

WARRANTY DEED FROM HOWELL TO KAMINSTER
BLOCK 61 LOTS 4 & 5
No mention of development rights

WARRANTY DEED FROM GLUCK TO KAMINSTER
BLOCK 61 LOTS 17 & 18
No mention of development rights

WARRANTY DEED FROM GUFFEY TO GUFFEY, (as trustee)
BLOCK 61 LOTS 15, 16 & 19
Undivided 1/3 interest in lot 19 property
& development rights

WARRANTY DEED FROM HOWELL TO KAMINSTER
BLOCK 61
Undivided 1/3 interest in lot 19 property
No mention of development rights

WARRANTY DEED FROM WALKER TO MARLINE ENT. INC.
BLOCK 61, LOT 1
Undivided 1/3 interest in lot 19 property
No mention of development rights

WARRANTY DEED FROM WALKER TO W.F.B. CRA
5/96
BLOCK 2, LOTS 21 & 22 PLUS 10,000 SQFT. OFC

SECOND AMENDED P.J.
REMSEN, (as trustee)
BLOCK 69, LOTS 4 & 5 ALL BLOCK 7
BLOCK 61, LOTS 6-14
125,000 SQFT. OFC Development Rights

REV. 5/19/97 DT-UTDEV/LHA

APPENDIX I — TRIAL EXHIBIT NO. 105, MAP DEPICTING LANDS WITHIN DRI ENCUMBERED BY SOUTHEAST BANK MORTGAGE

[Fold-Out Map Follows]


EVERGLADES
STREET
AVENUE
FLORIDA
31
32
73
GARDENIA
70
63
71
62
HIBISCUS
69
64
61
ROSEMARY
BOULEVARD
N.T.S.



SOUTHEAST BANK
$2 MILLION
5/15/89
ORB. 6065, PG. 1047

GEOGRAPHIC INFORMATION SYSTEM BASE MAP
Parcel Locations & Ownership

UPDATED / J.H.A. - 8/21/97

Petitioner's Exhibit 105

APPENDIX J — TRIAL EXHIBIT NO. 106, MAP DEPICTING LANDS WITHIN DRI ENCUMBERED BY DELTA FUNDING MORTGAGE

[Fold-Out Map Follows]


EVERNIA
STREET
5.2
5.1
4.2
4.1
3.2
3.1
1
31
6.1
6.3
6.2
7.2
7.1
8.1
8.2
9
10
AVENUE
FERN
32
73
AVENUE
STREET
GARDENIA
70
63
71
62
10
9
8
7
6
5
4
3
2
1
SAPODILLA
HIBISCUS
STREET
69
64
61
ROSEMARY
BOULEVARD
PINE
STREET
68
65
60
57
SOUTH
N.T.S.



DELTA FUNDING
(SKOPBANK)
$20 MILLION
6/30/89
ORB. 6115, PG. 819

GEOGRAPHIC INFORMATION SYSTEM BASE MAP
Parcel Locations & Ownership

UPDWNMRT / J.H.A. - 8/21/97

Petitioner's Exhibit 106

APPENDIX K — EXCERPT FROM PETITIONERS' INITIAL BRIEF FILED IN THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE FOURTH DISTRICT

INTRODUCTION

It is not uncommon for developers in Florida to spend great amounts of money and time to obtain development orders for developments of regional impact. Such development orders have extraordinary value both to developers and property owners. The question presented by this case is whether a governmental authority must compensate the holder of valuable development rights when these rights are specifically taken in a condemnation proceeding.

This is an appeal of a trial court judgment that effectively allowed a municipal agency to condemn certain property rights that were subject to a development order and to use those rights obtained by that development order without paying the owner of such rights any compensation. The trial court denied the owner of the development rights the right to make any presentation whatsoever to a jury as to the value of its development rights in the condemnation proceeding, even though the municipality itself, through prior dealings with the owner and with third parties had acknowledged the propriety and value of such rights. The effect of the trial court's judgment, if allowed to stand, will be that in Florida, government may take a developer's intangible development rights without *any* just compensation.

* * *

(3)

Supreme Court, U.S.
FILED
MAY 12 1999
CLERK

No. 98-1471

In The
SUPREME COURT OF THE UNITED STATES

ADVANTAGE WEST PALM BEACH, INC., BERT MOERINGS and MARSHA MOERINGS,

Petitioners,

v.

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, INC.,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fourth District

PETITIONERS' REPLY BRIEF

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14 pp

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

ARGUMENT 1

1. Whether Petitioners' Development Rights Have Compensable Value Upon a Taking Thereof By Respondent Presents a Federal Constitutional Question. 1

   a. The CRA's position. 1

   b. Advantage's property rights. 3

   c. Intangible rights as "property" under the Takings Clause. 4

2. Florida's Approval of Uncompensated Takings of Development Rights Conflicts With This Court's Precedent. 9

TABLE OF CITATIONS

Cases	Page
Board of Regents v. Roth 408 U.S. 564 (1972)	5
City of Hollywood v. Hollywood, Inc. 432 So. 2d 1332 (Fla. Dist. Ct. App.), *review denied,* 441 So. 2d 632 (Fla. 1983)	6, 7
Eastern Enterprises v. Apfel 524 U.S. 498, 118 S. Ct. 2131 (1998)	6
Lynch v. United States 292 U.S. 571 (1934)	5
Nollan v. California Coastal Commission 483 U.S. 825 (1987)	9, 10
Palm Beach County v. Cove Club Investors Ltd. 1999 WL 189834 (Fla. Apr. 8, 1999)	6
Penn Central Transportation Company v. City of New York 438 U.S. 104 (1978)	6, 9
Pennsylvania Coal Co. v. Mahon 260 U.S. 393 (1922)	3, 4
Phillips v. Washington Legal Foundation 524 U.S. 156, 118 S. Ct. 1925 (1998)	2, 5, 8
Ruckelshaus v. Monsanto Company 467 U.S. 986 (1984)	5
Suitum v. Tahoe Regional Planning Agency 520 U.S. 725, 117 S. Ct. 569 (1997)	9, 10

Webb's Fabulous Pharmacies, Inc. v. Beckwith
449 U.S. 155 (1980) 5, 8

Wilkinson v. St. Jude Harbors, Inc.
570 So. 2d 1332 (Fla. Dist. Ct. App.), *review denied*, 576 So. 2d 295 (Fla. 1990) 6

Yee v. City of Escondido
503 U.S. 519 (1992) 3, 9

11

MICHAEL A. HELLER & JAMES KRIER, *Deterrence and Distribution in the Law of Takings*
112 HARV. L. REV. 997 (1999) 3

ARGUMENT

1. Whether Petitioners' Development Rights Have Compensable Value Upon a Taking Thereof By Respondent Presents a Federal Constitutional Question.

a. The CRA's position.

The CRA's eminent domain petition sought to take, by exercise of its condemnation powers, real property located within the DRI boundaries *and* "any and all *rights of development* appertaining to said property pursuant to City of West Palm Beach Ordinance No. 2268-89," the DRI ordinance. Appendix G at 36a (emphasis supplied). The state trial court's Agreed Order of Taking recites that the CRA will pay approximately $1.9 million to purchase "all ownership, right, title or interest of [Advantage] in real property or property of any nature, *including but not limited to development rights,*" located within the DRI "or otherwise related or pertaining to said development." Appendix E at 18a-19a. The order expressly provides that, upon payment of the $1.9 million, "full and complete title to all development, contract and other rights held, or allegedly held" by Advantage" pursuant to the various assignments of development rights. "shall vest in [the CRA] *Id.* at 17a-18a.[1]

On appeal, the Florida court held that the DRI ordinance had not created "transferable development rights," for the taking of which Advantage was "entitled to

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[1] Advantage and the CRA agreed, as reflected in the order, that Advantage had not waived "any right to full or just compensation for real property, development rights, contract rights or other rights subject to or impacted by this eminent domain proceeding," and that the CRA had not waived "any right to argue or contend that [Advantage] is not the lawful owner of said rights, that said rights were not validly assigned, that said rights have no value or any other defense that may be asserted by [the CRA]." *Id.* at 18a.

be compensated." Appendix A at 3a. The court based this holding "on the specific language" of the DRI ordinance. Appendix D at 14a.

These indisputable record facts are restated to place into context the CRA's extraordinary contention that the rulings by the Florida courts in this case should not be reviewed by this Court because the question whether Advantage's development rights even *existed* — much less had compensable value when taken by the government — is purely a question of *state law*. Response to Petition for Writ of Certiorari (hereinafter Response) at 12-13, 19-21. From this premise flows virtually all of the CRA's arguments in opposition to Advantage's petition, *e.g.*, that the Florida courts did not decide a federal constitutional issue (or if a federal issue was decided, there is an independent state law ground).[2] The principle that "a State by *ipse dixit*, may not transform private property into public property without compensation," *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 118 S. Ct. 1925, 1931 (1998) (citation omitted), disallows the CRA's attempt to justify its taking of Advantage's property without compensation on the ground that, as a purported matter of state law, the property never existed in the first place.

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[2] For reasons that are not entirely clear, the CRA purports to oppose the petition based on a purported omission of recitations concerning the manner in which the constitutional issues were raised in the state court proceedings. Response at 17-18. The CRA seems to believe that United States Supreme Court Rule 14(1)(g)(i) requires a *separate* statement concerning the manner in which the petitioner's federal constitutional issues were raised in the state court, while the text of the rule itself demonstrates that this recitation is to be *included* in the petitioner's factual statement. Advantage's factual statement amply complies with the rule's requirements. See Petition for Writ of Certiorari at 6-8.

b. Advantage's property rights.

The Development Order adopted by the City in the DRI ordinance is nothing more or less than a contract between the City and the original developer, the DUV, pursuant to which agreement the DUV was granted "development approval for approximately 78 acres of real property," subject to certain conditions, and further subject to the requirement that site plan approval be granted for "the development of individual parcels." Appendix F at 24a-30a. The Development Order, like any contractual agreement, is "binding upon ... the Developer and its assigns or successors in interest." *Id.* at 31a. Simply put, the Development Order entitles the developer to proceed with development within the DRI — development that is allowable *only* because of the rights to develop office space, retail stores, hotels and dwelling units that *did not otherwise appertain* to the property located within the DRI. Appendix F. It could hardly be said, and the CRA certainly makes no attempt to say, that the Development Order did not confer upon the developer a reasonable expectation that, upon compliance with the conditions set forth therein, the development rights conferred thereby could be exercised.

It is curious indeed that the CRA, having sought and obtained *actual title* to Advantage's development rights under the DRI ordinance and the Development Order, should now assert that the condemned property *never existed*. Perhaps the one constant in this Court's takings jurisprudence is the fundamental proposition that the Takings Clause requires payment of just compensation when the government "actually takes title" to private property. *Yee v. City of Escondido,* 503 U.S. 519, 522 (1992). Even before the advent of *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), this rudimentary precept was never in question. MICHAEL A. HELLER & JAMES KRIER, *Deterrence and Distribution in the Law of Takings,* 112 HARV. L. REV. 997, 1023 (1999) (hereinafter *Deterrents and Distribution*). No decision of this Court (or of any other court, for that matter) appears to have addressed the unusual proposition urged upon the Court by the CRA: that government may condemn property through

the use of the eminent domain power and then evade the just compensation requirement of the Fifth Amendment by asserting that the condemned property *never existed.*

In making this argument, the CRA goes even beyond the ruling of the state appellate court. The state court phrased the issue as being "whether appellants are entitled to compensation for certain 'development rights' as part of a taking in eminent domain." Appendix A at 2a. The court held that "[n]either the language of the DRI, nor the development process contemplated by the ordinance, support the conclusion that transferable development rights were created *for which appellants are entitled to be compensated.*" *Id.* at 3a (emphasis supplied). The court did not hold that the right to develop property is not in and of itself a property right — because such a holding would run counter to the very nature of "property" in American law. See Petition at 9-13. Rather, the court held that the development rights within the DRI did not "exist separate and apart from the underlying realty" and "were not severable from the realty," such that Advantage held "no separate, *compensable property interest* known as development rights." Appendix A at 2a (emphasis supplied). Thus is presented the federal constitutional issue posed by Advantage's petition, *i.e.*, whether a governmental taking of intangible development rights requires payment of just compensation.

c. Intangible rights as "property" under the Takings Clause.

The Court's takings jurisprudence has not often looked to the definition of private property. While "[t]he ... issue is obviously latent in every takings dispute, ... it is seldom aired in any because the 'propertyness' of the asset at stake in the litigation is usually uncontested." *Deterrence and Distribution, supra* at 1013. That intangible rights are "property" within the meaning of the Takings Clause, however, has never been seriously questioned. In *Mahon*, the Court struck down a statute that "destroy[ed] previously existing rights of property *and contract*." 260 U.S. at 413 (emphasis supplied). The oft-

cited decision in *Lynch v. United States*, 292 U.S. 571 (1934), expressly held that "[v]alid contracts *are property*, whether the obligor be a private individual, a municipality, a state, or the United States." *Id.* at 579 (emphasis supplied).

The CRA, however, urges that the issue is settled by state law, thereby taking the case out of the ambit of the Takings Clause and establishing an adequate state ground for the decision below. Response at 16-20. The CRA invokes the general proposition that property interests are created by state law, *id.* at 20-21, and insists that the state court's ruling should be allowed to stand because, as a matter of Florida law, "no 'development rights' were created by the Development Order," and Advantage thus "own[s] no property interest which has been taken by eminent domain." *Id.* at 16.

The underlying constitutional proposition upon which the CRA relies is correct: the formulation first adopted in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), to govern the application of procedural due process guarantees, has long been recognized as the standard for determining whether rights taken by a state are "property" under the Takings Clause. *E.g., Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 1001 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). This Court reaffirmed that principle in *Phillips*, 118 S. Ct. at 1930 ("[b]ecause the constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law'") (quoting *Roth*).

In *Ruckelshaus*, the Court considered the question whether corporate trade secrets constituted "property" under the Fifth Amendment. 467 U.S. at 1001-02. The Court noted that it had found "other kinds of intangible interests to be property for purposes of the Fifth Amendments Taking Clause." *Id.* at 1003. As the Court recognized, "[t]hat intangible property rights protected by state law are deserving of the protection of the Taking

Clause has long been implicit in the thinking of this Court." *Id.* at 1003.[3]

The CRA's attempt to shield the Florida court's ruling in this case from review by invoking the rubric of state law founders on two unquestionable Florida law holdings. First, as the Florida Supreme Court very recently has reaffirmed, "all property within the state, both real and personal, tangible and intangible, is subject to the government's exercise of eminent domain," and "the class of compensable property interests has been enlarged to broadly encompass leaseholds, easements, and personal property, as well as incorporeal hereditaments such as franchises *and contract*." *Palm Beach County v. Cove Club Investors Ltd.*, 1999 WL 189834 (Fla. Apr. 8, 1999) (emphasis supplied). Second, as set forth in the Petition and essentially conceded by the CRA, Response at 16, Florida's long-standing approval of TDR programs constitutes a recognition that development rights can exist separate and apart from a parcel of real property. *E.g.*, *Wilkinson v. St. Jude Harbors, Inc.*, 570 So. 2d 1332, 1333 (Fla. Dist. Ct. App.) (TDRs "are not real property," but "are separated from their land source and re-established on a designated recipient site"), *review denied*, 576 So. 2d 295 (Fla. 1990); *City of Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332, 1337-38 (Fla. Dist. Ct. App.) ("a TDR allows that development rights, attributable to one piece of land, be transferred to another"), *review denied*, 441 So. 2d 632 (Fla. 1983). Indeed, the decision in *City of Hollywood*, addressing the question that was left open by this Court in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 122 (1978), held that TDRs may be used to

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[3] The Court ultimately held that Monsanto had a property interest in its trade secrets, which interest was protected by the Fifth Amendment. *Id.* at 1003-04. This holding is consistent with this Court's recent decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131 (1998), and the other decisions on intangible rights and the Takings Clause cited in the Petition at 12 n.6.

"offer[] a developer 'fair compensation' in the form of increased development rights on other land in return for land use restrictions on the land sought to be preserved." *City of Hollywood,* 432 So. 2d at 1337.

The CRA accuses Advantage of having "confused the development order in this case with formal transfer of development rights (TDR) programs." Response at 16. What the CRA's argument ultimately reveals, however, is the utter lack of any such distinction. As the CRA argues, TDR programs "are authorized, established, and regulated by specific statutory provisions or a local ordinance." *Id.* The Development Order that created the DRI and the associated development rights *was established by local ordinance* and, like TDR programs, the development scheme for the DRI is closely regulated by the Development Order. Further, the Development Order expressly contemplates that the rights created thereby are transferable, because the ordinance provides that the Development Order "shall be binding upon and inure to the benefit of the Developer *and its assigns or successors in interest.*" Appendix F at 31a (emphasis supplied). There is absolutely no distinction, in law or in fact, between the "transferable" rights to develop within the DRI that were created by the Development Order pursuant to a municipal ordinance and what the CRA chooses to call "formal" TDR programs. Indeed, when Advantage sought rehearing before the state appellate court, asserting that the court appeared to have imposed, as a prerequisite to compensation for a taking of development rights, the existence of a "formal" TDR ordinance, the court took Advantage to task for having "misread the ... opinion." Appendix D at 14a. Thus, Florida law recognizes *both* that intangible rights constitute "property" and that development rights may be severed from real property.

The utter lack of any state law foundation upon which the CRA can rest its only argument in opposition to certiorari is patent. Moreover, even if the Florida court *had* ruled in the manner suggested by the CRA, *i.e.,* if the court had held that the development rights taken by the CRA did not exist under Florida law, this Court's decision

in *Webb's Fabulous Pharmacies* would pretermit the CRA's argument.

The issue in *Webb's Fabulous Pharmacies* arose from a county's retention of interest earned by monies deposited in an interpleader action, pursuant to a statute authorizing retention of the interest. 449 U.S. at 158-60. The state court held that the interest was not "private property." *Id.* at 163. This Court, while recognizing that "[p]roperty interests ... are not created by the Constitution," but rather by "existing rules or understandings that stem from an independent source such as state law," 449 U.S. at 161, declined to give controlling weight to the state court's holding:

> The county's appropriation of the beneficial use of the fund is analogous to the appropriation of the use of private property ....
>
> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.
>
> To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Id. at 163-64 (citations omitted). This Court reaffirmed the *Webb's Fabulous Pharmacies* holding in *Phillips*, emphasizing that, "at least as to confiscatory regulations ...

a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." 118 S. Ct. at 1931 (citations omitted).

2. Florida's Approval of Uncompensated Takings of Development Rights Conflicts With This Court's Precedent.

The CRA's persistence in mischaracterizing Advantage's basis for invoking this Court's jurisdiction is also reflected in its attempt to argue that the decision below can be harmonized with this Court's decisions in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), *Penn Central,* and *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 117 S. Ct. 569 (1997). See Response at 12-15. The CRA cannot suggest that *Nollan* did not endorse the severability of independent property rights, so the CRA is left with the argument that *Nollan* "did not involve a taking under California's eminent domain proceedings." Response at 14. The CRA, however, is forced to acknowledge that this Court in *Nollan* "determined ... whether or not the infringement of these rights was compensable pursuant to the Takings Clause of the Fifth Amendment." *Id.* Surely the CRA is not suggesting that this Court would have decided *Nollan* differently had the easement in that case been taken in a condemnation proceeding under state eminent domain law.

The only meaningful distinction between an *inverse* condemnation claim, such as was made in *Nollan*, and a claim for compensation arising out of an eminent domain taking, such as in the present case, is that the party seeking recovery on an inverse condemnation theory must *first* establish that there has been a "taking," *Nollan* 483 U.S. at 831, whereas there *unquestionably* has been a taking when the government exercises its eminent domain power, *e.g., Yee,* 503 U.S. at 522. Thus, there is no principled way in which to say that a regulatory "taking" of severable property rights entitles the property owner to compensation, whereas *no* compensation is due to a property owner whose rights are taken by eminent domain. Indeed, merely to

state the proposition is to demonstrate its utter absurdity. This Court's decision in *Nollan* speaks directly to the point:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather ... "a mere restriction on its use," is to use words in a manner that deprives them of all of their ordinary meaning. Indeed, one of the principal uses of the eminent domain power *is to assure that the government be able to require conveyance of just such interests, so long as it pays for them.* Perhaps because the point is so obvious, we have never been confronted with a controversy that required use to rule upon it ....

483 U.S. at 831 (citations omitted; emphasis supplied).

Addressing *Suitum,* the CRA accurately recites that the issue presented to the Court in that case was the ripeness of the inverse condemnation claim. Response at 14-15. What the CRA chooses to ignore, however, is the majority's holding in *Suitum* that the valuation of TDRs "is ... simply an issue of fact about possible market prices," 107 S. Ct. at 1668, *i.e.,* the Court's express acknowledgement that severable development rights *have value*. Indeed, as noted in the Petition, and unremarked upon by the CRA, the TDRs at issue in *Suitum* are utterly indistinguishable from the development rights conferred by the DRI ordinance in this case. See Petition at 20-22. The CRA cannot explain away the Florida court's declaration that severable development rights, as a matter of law, *have no value* when those rights are taken by government in an eminent domain proceeding.

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